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No. 04-746

In The
Supreme Court of the United States

TONY HARRIS IN HIS CAPACITY AS ACTING DIRECTOR OF THE CALIFORNIA DEPARTMENT OF TRANSPORTATION,

Petitioner,

v.

NANO MALDONADO, AN INDIVIDUAL,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Ninth Circuit err in departing from the *Rooker-Feldman* doctrine's "inextricably intertwined" test so as to allow forbidden de facto appeals of state court injunctions in federal court?

2. Did the Ninth Circuit err in failing to bar, on res judicata grounds, a federal constitutional challenge to a state court injunction where the federal plaintiff had the opportunity to raise the same constitutional challenge in the prior state court action?

3. Did the Ninth Circuit erroneously afford a federal forum to a prior state court defendant on a federal constitutional ground not presented to the state court?

4. Did the Ninth Circuit err in holding that accrual of the statute of limitations for the federal court Section 1983 claim did not commence with the issuance of the state court injunction?

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

TONY HARRIS, in his capacity as Acting Director of the California Department of Transportation;

NANO MALDONADO, an individual on behalf of himself.

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PETITION FOR WRIT OF CERTIORARI

The *Rooker-Feldman* doctrine serves an important role in preventing the lower federal courts from exercising subject matter jurisdiction to conduct de facto appellate review of decisions made by state courts. It is a cornerstone of judicial federalism. Although most circuits have preserved the doctrine within its intended scope, the Ninth Circuit has effectively discarded it altogether and placed its federal courts in the position of relitigating state court actions, and potentially reversing state court decisions. As one result of the Ninth Circuit's ruling, comity between these separate court systems will inevitably erode.

The *Rooker-Feldman* doctrine derives from two cases the Court decided sixty years apart, *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983). The essence of the doctrine is that federal district courts "do not have jurisdiction . . . over challenges to state court decisions in particular cases arising out of judicial proceedings." *Feldman*, 460 U.S., at 486.

The plaintiff in *Rooker* brought a bill in equity in federal district court seeking to have a judgment of an Indiana court, which was affirmed by the Indiana Supreme Court, "declared null and void, and to obtain other relief dependent on that outcome." 263 U.S., at 414. The plaintiff argued that the state court judgment violated the Contract Clause of the United States Constitution as well as due process and equal protection. *Id.*, at 414-15. The Court held that it "would be an exercise of appellate jurisdiction" for the federal district court to review the state court judgment. *Id.*, at 416. The federal district court

did not have jurisdiction to perform that review because § 237 of the Judicial Code (now 28 U.S.C. § 1257) conferred jurisdiction to review state court judgments only on this Court, while "[t]he jurisdiction possessed by the District Courts is strictly original." *Id.* Moreover, the state courts had "the province and duty" to decide any constitutional questions raised by the application of the state statute at issue. *Id.*, at 415. *Rooker* thus established the principle, derived from statute, that a party cannot appeal a state court judgment in a federal district court, and the only recourse for an adverse decision in a state court is an appeal to the state appellate courts, with the possibility of ultimate review by this Court. *See, e.g.*, *Parkview Assocs. Partnership v. City of Lebanon*, 225 F.3d 321, 324 (CA3 2000).

Although *Rooker* itself presented a direct attack on a state court judgment, *Feldman* further articulated the test for whether a federal claim is in effect a de facto attack on a previous state court ruling: "If the constitutional claims . . . are inextricably intertwined with the state court's denial in a judicial proceeding of a particular plaintiff's application [for relief], then the District Court is in essence being called upon to review the state court decision. This the District Court may not do." *Id.*, at 483 n.16.

The Ninth Circuit's decision herein effectively abrogates the "inextricably intertwined" aspect of the *Rooker-Feldman* doctrine by holding that *Rooker-Feldman* does not bar a subsequent Section 1983 action which on its face seeks to enjoin the enforcement of a prior state court civil judgment. The Ninth Circuit's rationale is that a federal court may enjoin enforcement of a state court injunction so long as the federal complaint does not expressly claim legal error by the state court. *See* App. 7. The court's

holding is in conflict with this Court's decision and rationale in *Feldman* and with the application of the doctrine by other courts of appeals. The Ninth Circuit's approach invites losing parties in state court to seek disguised appeals through artful pleading in federal court, which expressly seek to reverse, nullify, or enjoin the execution of a state court judgment.

The next jurisdictional doctrine cast aside by the Ninth Circuit is res judicata whose fundamental principle is the avoidance of piecemeal litigation by requiring that all issues that could have been raised in a prior action are precluded from being raised in a subsequent action. The Ninth Circuit determined that a Section 1983 complaint, brought in a subsequent federal claim, which could have been brought in the prior state court action to challenge the constitutionality of the statutes on which the state court injunction was based, was not barred by res judicata. The court's departure from settled California law pertaining to the doctrine of res judicata was achieved by erroneously restricting the application of res judicata to compulsory counterclaims under state law. The result ignores the issue that the statutes' constitutionality could have, and should have if pertinent, been raised in the prior state court action. The Ninth Circuit's decision rewards procedural gamesmanship and forum shopping and, if allowed to stand, would permit parties to withhold defenses and claims for strategic advantage in state court, in derogation of the policies behind res judicata. The decision is contrary to the congressional mandate that federal courts give to state court judgments the same full faith and credit as another state court would provide.

Finally, with respect to the statute of limitations for the filing of Section 1983 claims, the Ninth Circuit's

decision concerning accrual of the statute of limitations has abandoned all limiting principles – holding in effect that the statutes on which the prior state court injunction was issued, and the injunction itself, can be challenged on facial and on as-applied constitutional grounds, at anytime, even decades after the injunction has issued. This unprecedented ruling places prevailing parties in perpetual uncertainty concerning the finality of judgments.

Taken together, the court's various decisions cause irreparable harm to important jurisdictional and procedural doctrines designed to foster respect between the federal and state court systems, heighten judicial efficiency and economy, and deter litigants from engaging in gamesmanship, forum shopping and perpetual relitigation of issues that could have previously been presented.

CITATION OF OPINIONS AND ORDERS

The Court of Appeals' opinion, App. 1, is reported at 370 F.3d 945 (CA9 2004). The unreported opinion of the district court is enclosed. App. 39.

BASIS FOR JURISDICTION

The Ninth Circuit delivered its judgment and opinion on June 4, 2004. App. 1. The Petitioner timely filed a petition for rehearing en banc in the Court of Appeals. On August 27, 2004, the Court of Appeals filed an order denying both a petition for rehearing and a petition for rehearing en banc. App. 52. The present petition is timely

filed under 28 U.S.C. § 2101(c) and under Rule 13.3 of this Court. Petitioner herein invokes this Court's jurisdiction under 28 U.S.C. § 1254 to seek review of that judgment of a federal court of appeals by a writ of certiorari.

STATUTES INVOLVED

28 U.S.C. § 1257 provides:

> "(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.
>
> (b) For the purposes of this section, the term 'highest court of a State' includes the District of Columbia Court of Appeals."

28 U.S.C. § 1738 provides:

> "The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other

courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

STATEMENT OF THE CASE

In 1998, the California Department of Transportation (hereinafter "the Department") sought a permanent injunction in state court against Nano Maldonado to prevent him from posting certain prohibited commercial advertisements on his Highway 101 adjacent billboard, based on state statutes known collectively as the California Outdoor Advertising Act. *See* App. 53. In his answer, Maldonado 1) did not assert any affirmative defenses that these statutes were unconstitutional, 2) did not file a counterclaim seeking declaratory and injunctive relief against the Department that these statutes were unconstitutional, and 3) did not file a Section 1983 claim against the Department's Director to enjoin enforcement of allegedly unconstitutional statutes. *See* App. 57. Following trial, a permanent injunction was entered in November, 1999. *See* App. 20. Maldonado also failed to present any challenge to the constitutionality of these statutes in his unsuccessful state court appeal; this appeal led to a reported decision. *See* App. 24 (*People ex rel. Department*

of Transportation v. Maldonado, 86 Cal.App.4th 1225 (2001)).

On July 2, 2002, more than two years after the injunction had issued, Maldonado filed a Section 1983 federal district court action for equitable relief against the then Director Jeff Morales of the Department alleging, for the first time, that the California Outdoor Advertising Act statutes were unconstitutional on First Amendment grounds. *See* App. 63. Maldonado's prayer for relief in this federal court complaint included a request that a permanent injunction be issued against any attempt by the defendant to "enforce any injunction based upon" those statutes. *See* App. 77, 78. The district court in its Memorandum and Order dismissed the Section 1983 claim as barred by both res judicata and the *Rooker-Feldman* doctrine. *See* App. 39. It did not reach the statute of limitations issue, since there was no need to do so.

A Ninth Circuit panel (Fletcher, B.B, Reinhardt, S. and Restani, J.A.) reversed the district court on both grounds and issued its reported decision on June 4, 2004. *See* App. 1. With respect to *Rooker-Feldman*, the Ninth Circuit held that it did not bar Maldonado's federal action to enjoin enforcement of the state court injunction. The court stated, " . . . Maldonado does not allege any legal errors by the California state court as a basis for relief, and *Rooker-Feldman* therefore does not bar his federal action." *See* App. 8. As will be discussed herein, among the courts of appeal of this Nation, the Ninth Circuit stands alone in this interpretation of the *Rooker-Feldman* doctrine. The court's decision will cause irreparable harm to the state and federal courts in this circuit by opening the federal courts to endless challenges by losing state court parties.

With respect to why res judicata was inapplicable, the Ninth Circuit decided that the Section 1983 cross-complaint against the Department's Director was a permissive and not a compulsory cross-complaint under California law, and thus concluded, "the fact that Maldonado could have brought a cross-complaint, however, does not mean he was *required* to do so." (Emphasis in the original). *See* App. 10. In this conclusion, the Ninth Circuit failed to identify the proper legal test, namely, whether by such permissive cross-complaint, or by other means, Maldonado could have raised the issue of the statutes' constitutionality in the prior state court action. In so failing, the court sets a detrimental precedent by permitting parties to withhold issues that could have been raised in the prior action. The court's decision is also in derogation of the congressional mandate that federal courts give the same full faith and credit to a state court judgment as would be provided by that state's other courts.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE NINTH CIRCUIT AND OTHER CIRCUIT COURTS RESPECTING THE APPLICATION OF THE *ROOKER-FELDMAN* DOCTRINE.

A. The Ninth Circuit is Unique Among the Federal Circuit Courts By Effectively Abandoning the "Inextricably Intertwined" Test of the *Rooker-Feldman* Doctrine Thereby Allowing Forbidden De Facto Appeals.

The Ninth Circuit stands as the only circuit to reject the "inextricably intertwined" test first enunciated by this

Court in *Feldman* as an independent means of determining subject matter jurisdiction when a federal court plaintiff seeks de facto appeal of a state court judgment. In *Maldonado*, the Ninth Circuit explained its reversal of the district court's dismissal on *Rooker-Feldman* grounds at App. 7:

> "The district court relied on a passage in *Fontana Empire Center, LLC v. City of Fontana*, 307 F.3d 987, 992 (9th Cir. 2002) where we stated that the *Rooker-Feldman* doctrine 'precludes a federal district court from exercising jurisdiction over general constitutional challenges that are inextricably intertwined with claims asserted in state court.' We recognize that this statement in *Fontana can* be misleading when it is read out of context. However, as we explained in *Noel*,
>
> > [t]he premise for the operation of the 'inextricably intertwined' test . . . is that the federal plaintiff is seeking to bring a forbidden de facto appeal. The federal suit is not a forbidden appeal because it is 'inextricably intertwined' with something. Rather, it is simply a forbidden de facto appeal. Only when there is already a de facto appeal in federal court does the 'inextricably intertwined' test come into play: Once a federal plaintiff seeks to bring a forbidden de facto appeal, as in *Feldman*, the federal plaintiff may not seek to litigate an issue that is 'inextricably intertwined' with the state judicial decision from which the forbidden de facto appeal is brought.

> *Noel,* 341 F.3d at 1158. In this case, Maldonado is not bringing a forbidden de facto appeal because he is not alleging as a legal wrong an erroneous decision from the state court. *See id.* at 1164. Therefore, the 'inextricably intertwined' test does not come into play. Our conclusion remains the same even though Maldonado's complaint seeks relief from the injunction entered by the state court."

No other court of appeals has adopted the Ninth Circuit's formulation above that a federal claim may be used to enjoin a state court injunction simply because the federal plaintiff "is not alleging as a legal wrong an erroneous decision from the state court."[1] In stark contrast, other circuits properly focus their *Rooker-Feldman* analysis on whether *the effect of the relief requested or the findings of the federal court* would act to reverse, nullify, or modify the state court judgment. For example, the Eighth Circuit in *Charchenko v. City of Stillwater*, 47 F.3d 981, 985 (CA8 1995) ruled:

> "A federal district court has jurisdiction over general constitutional challenges if these claims are not inextricably intertwined with the claims asserted in state court. A claim is inextricably intertwined if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it. In other words, **Rooker-Feldman precludes a federal action if the**

[1] In *Noel v. Hall*, 341 F.3d 1148 (CA9 2003), the Ninth Circuit first articulated its disregard for the "inextricably intertwined" test of the *Rooker-Feldman* doctrine.

> **relief requested in the federal action would effectively reverse the state decision or void its ruling**. Accordingly, to determine whether Rooker-Feldman bars [plaintiffs] federal suit requires determining exactly what the state court held. . . . if the relief requested in the federal action requires determining that the state court decision is wrong or would void the state court's ruling, then the issues are inextricably intertwined and the district court has no subject matter jurisdiction to hear the suit." [Citations omitted.] (Emphasis added).

The Seventh Circuit in *GASH Assocs. v. Village of Rosemont, Ill.*, 995 F.2d 726, 728 (CA7 1993), whose holding was cited with approval by the Tenth Circuit in *Kenman Engineering v. City of Union*, 314 F.3d 468, 479-80 (CA10 2002), explained:

> "The *Rooker-Feldman* doctrine asks: is the federal plaintiff seeking to set aside a state judgment, or does he present some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party? If the former, then the district court lacks jurisdiction; if the latter, then there is jurisdiction and state law determines whether the defendant prevails under principles of preclusion." *Id.*, at 728.

The Third Circuit in *FOCUS v. Allegheny County Court of Common Pleas*, 75 F.3d 834, 840 (CA3 1996), echoes the Seventh Circuit in articulating the determinative inquiry for applying the *Rooker-Feldman* doctrine:

> "When a plaintiff seeks to litigate a claim in a federal court, the existence of a state court judgment in another case bars the federal proceeding

> under *Rooker-Feldman* only when entertaining the federal court claim would be the equivalent of an appellate review of that order. For that reason, *Rooker-Feldman* applies only when in order to grant the federal plaintiff the relief sought, the federal court must determine that the state court judgment was erroneously entered **or must take action that would render that judgment ineffectual.**" (Emphasis added.)

In another Third Circuit case, *E.B. v. Verniero*, 119 F.3d 1077, 1090-91 (CA3 1997), involving a group of sex offenders who brought actions against the New Jersey Attorney General challenging the constitutionality of community notification provisions of New Jersey's "Megan's Law", the court viewed the relief requested as "a paradigm [*Rooker-Feldman*] situation" and reversed the district court's failure to dismiss:

> "As appellants stress, the relief E.B. seeks in this proceeding is an injunction directing that the notification ordered by the New Jersey Supreme Court, Law Division, not be carried out.
>
> We agree with appellants that this is a paradigm situation in which Rooker-Feldman precludes a federal district court from proceeding. To grant E.B. relief would require an inferior federal court to determine that the New Jersey Court's judgment was erroneous and would foreclose implementation of that judgment."

In these and other circuits[2] the "paradigm situation" present in the *Maldonado* case compels dismissal. However, for the Ninth Circuit, the "inextricably intertwined" test "does not come into play." By limiting impermissible *de facto* appeals exclusively to federal court complaints which plead legal error by the state court, the court simply invites artful pleading which can be employed to enjoin enforcement of state court judgments. The Ninth Circuit's blueprint for losing state court litigants to avoid the bar of *Rooker-Feldman*, and to engage in forbidden de facto appeals should be reviewed by this Court.

B. The Court's Recent Grant of Review in a Case Involving the Scope of the *Rooker-Feldman* Doctrine Does Not Address the Viability of the "Inextricably Intertwined" Test, Which the Ninth Circuit's Decision Calls into Question.

In the two decades since *Feldman*, the Court has addressed the *Rooker-Feldman* doctrine in only a handful of cases, and then only briefly. In each, the viability of the "inextricably intertwined" test to the applicability of the bar of *Rooker-Feldman* was not addressed. *See Verizon Md.*

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[2] Other circuit courts of appeals also apply the "inextricably intertwined" test to bar federal claims which, *in substance*, seek appellate review of state court judgments. *See Hill v. Town of Conway*, 193 F.3d 33, 49-50 (CA1 1999); *Moccio v. N.Y. State Office of Court Admin.*, 95 F.3d 197, 198-99 (CA2 1996); *Jordahl v. Democratic Party of Virginia*, 122 F.3d 192, 202 (CA4 1997); *Hood v. Keller*, 341 F.3d 593, 598-99 (CA6 2003); *Kiowa Indian Tribe of Oklahoma v. Hoover*, 150 F.3d 1163, 1169-71 (CA10 1998); and, *Powell v. Powell*, 80 F.3d 464, 467 (CA11 1996).

v. Pub. Serve Comm'n, 535 U.S. 635, 644 n.3 (2002) (noting that *Rooker-Feldman* "has no application to judicial review of executive action, including determinations made by a state administrative agency"); *Johnson v. De Grandy*, 512 U.S. 997, 1005-06 (1994) (describing "this Court's *Rooker/Feldman* abstention doctrine, under which a party losing in state court is barred from seeking what in substance would be appellate review of the state judgment in a United States district court, based on the losing party's claim that the state judgment itself violates the loser's federal rights"); *Howlett v. Rose*, 496 U.S. 356, 370 (1990) (describing *Rooker-Feldman* as "the rule that a federal district court cannot entertain an original action alleging that a state court violated the Constitution by giving effect to an unconstitutional state statute"); *ASARCO Inc. v. Kadish*, 490 U.S. 605, 622-23 (1989) (observing that the appeal from the Arizona Supreme Court would have been barred by *Rooker-Feldman* if it had instead been brought originally in a federal suit).

While this Court has recently granted review of the Third Circuit's decision in *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 364 F.3d 102 (CA3 2004) involving application of the *Rooker-Feldman* doctrine, that petition is principally concerned with a split among the courts of appeal respecting the relationship between *Rooker-Feldman* and preclusion principles. Resolving that split will be of no assistance to petitioner herein nor to the negative implications surrounding the Ninth Circuit's effective abandonment of the "inextricably intertwined" test.

To permit the Ninth Circuit's decision to stand as reported precedent provides losing parties in state court actions a roadmap to artfully plead disguised appeals in

federal court. Consequently, the district courts in this circuit will no doubt find many more such lawsuits on their doorstep, and, of equal importance, vital principles of federalism and the comity between state and federal courts will suffer.

II. THE NINTH CIRCUIT ERRONEOUSLY LIMITED CALIFORNIA'S RES JUDICATA BAR TO COMPULSORY COUNTERCLAIMS THEREBY FAILING TO APPLY RES JUDICATA TO ISSUES THAT COULD HAVE BEEN RAISED BY WAY OF CLAIMS OR DEFENSES IN THE PRIOR ACTION.

This Court has held that federal courts must give state court judgments the same res judicata effect that they would be given by another court of that state. *Migra v. Warren City Sch. Dist. Bd. of Ed.*, 465 U.S. 75, 84 (1984). In *Sutphin v. Speik,* 15 Cal.2d 195, 202 (1940) the California Supreme Court stated the California rule regarding the scope of res judicata as follows:

> "Next is the question, under what circumstances is a matter to be deemed decided by the prior judgment? Obviously, if it is actually raised by proper pleadings and treated as an issue in the cause, it is conclusively determined by the first judgment. But the rule goes further. If the matter was within the scope of the action, related to the subject matter and relevant to the issues, so that it *could* have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged. The reason for this is manifest. A party cannot by negligence or design withhold issues and litigate them in consecutive actions. Hence the rule is

> that the prior judgment is *res judicata* on matters which were raised or could have been raised, on matters litigated or litigatable. [Citations.] . . . 'This principle also operates to demand of a defendant that all of its defenses to the cause of action urged by the plaintiff be asserted under the penalty of forever losing the right to thereafter so urge them.'"[3] (Emphasis in the original).

In *Takahashi v. Board of Education*, 202 Cal.App.3d 1464, 1484-5 (1988), the state appellate court affirmed dismissal of plaintiff teacher's constitutional and civil rights claim for wrongful termination on res judicata grounds where the teacher failed to raise those defenses in the prior administrative hearing and subsequent writ of mandate. California and previous Ninth Circuit cases have universally followed the principle that failure to raise issues or exhaust remedies at the state court level precludes raising the issue in a subsequent action. In *Amin v. Khazindar*, 112 Cal.App.4th 582 (2003), following a partition action by the nonresident landowner against the resident, the appellate court held that the resident's subsequent action respecting a claimed homestead exemption was barred by res judicata based on the resident's

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[3] This Court in *Migra* remanded to the district court to apply the State of Ohio Supreme Court's claim preclusion law to the Section 1983 claim at issue. That state's preclusion law is strikingly similar to California's and is quoted on page 87 of this Court's opinion:

> "When in a prior injunction action brought to enjoin the defendant landowner's violation of a zoning law, the defendant asserts the affirmative defense of non-conforming use, but does not assert the unconstitutionality of the law, the landowner is, on the principal of res judicata, barred from later bringing a declaratory judgment action alleging such law to be unconstitutional."

failure to raise this issue in the prior proceeding. In *Miller v. County of Santa Cruz*, 39 F.3d 1030 (CA9 1994), the Ninth Circuit barred Miller's federal Section 1983 suit on res judicata grounds for his failure to seek state court judicial review of the administrative agency tribunal's decision. Maldonado could have challenged the statutes' constitutionality in the state court proceedings but failed to do so.[4]

While the Ninth Circuit concurred that Maldonado's current constitutional challenge was "a related cause of action" to that taken by the Department in the prior state court action, the court concluded that such cross-complaint was not compulsory under California law since the Department's Director was not a named party in the prior state court action and the Department is not a "person" under Section 1983. *See* App. 9, 10. Although the court properly concluded that Maldonado could have brought a Section 1983 claim against the Department's Director as a permissive cross-complaint in the prior state court action, the court rejected the application of the bar of res judicata on the basis that, "[t]he fact that Maldonado could have brought a cross-complaint, however, does not mean that he was *required* to do so." (Emphasis in the original). *See* App. 10. This ruling is clearly erroneous. Under principles governing the application of res judicata by the California Supreme Court in *Sutphin*, a related cause of

[4] In addition to the opportunity to challenge in the state court the statutes' constitutionality by permissive cross-claim against the Director or by affirmative defense, Maldonado had other means at his disposal. California courts have long held that an action for declaratory and injunctive relief is a proper method for challenging a statute's constitutionality. *California Restaurant Ass'n v. Henning*, 173 Cal.App.3d 1069, 1073-1074 (1985).

action, i.e., "related to the subject matter and relevant to the issues" that could have been raised in the prior action, may not be raised in a subsequent action.

To sum up, the Ninth Circuit's decision violates long-established principles which requires federal courts to apply state court preclusion rules. To permit Maldonado to now raise the issue of these statutes' constitutionality eviscerates a guiding principle of California's preclusion rules – avoidance of piecemeal litigation. By significantly narrowing the scope of the doctrine of res judicata, the Ninth Circuit has encouraged litigants, for strategic reasons, to withhold issues and defenses from the state court which will inevitably result in increased federal litigation.

III. THE NINTH CIRCUIT HAS RENDERED UNCERTAIN ALL STATE COURT INJUNCTIONS BY ERRONEOUSLY FAILING TO RECOGNIZE THAT THE SECTION 1983 STATUTE OF LIMITATIONS COMMENCES WITH ISSUANCE OF THE STATE COURT INJUNCTION.

No discussion of accrual principles should begin without recognizing the salutary purposes served by statutes of limitations. As this Court emphasized a half century ago in *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-349 (1944):

> "Statutes of limitation * * * are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend

> within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them."

Indeed, from the earliest days of the Republic to the present, this Court has held to the view that "[a] federal cause of action 'brought at any distance of time' would be 'utterly repugnant to the genius of our laws.'" *Wilson v. Garcia*, 471 U.S. 261, 271 (1985). *See also United States v. Kubrick*, 444 U.S. 111, 117 (1979) (noting that statutes of limitations "'are found and approved in all systems of enlightened jurisprudence,'" and should be regarded "as a 'meritorious defense, in itself serving a public interest'") (quoting *Wood v. Carpenter*, 101 U.S. 135, 139 (1879), and *Guaranty Trust Co. v. United States*, 304 U.S. 126, 136 (1938)). The Ninth Circuit's decision to permit Maldonado to attack the state court injunction, at any time he so chooses, thus offends long-established jurisprudential policies.

The basic rule for accrual of a Section 1983 action is that a federal claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action. *See Pete v. Metcalfe*, 8 F.3d 214, 217 (CA5 1993) and *Cox v. Stanton*, 529 F.2d 47, 50 (CA4 1975). The Ninth Circuit's decision announced that it follows this accrual rule as well. App. 17. As to the applicable statute of limitations, the court adopted California's one-year personal injury statute for Section 1983 claims. App. 16.

The relevant proceedings below are these: the state court injunction issued on October 27, 1999. App. 20. This injunction is prospective and prohibits future advertising displays which violate the injunction's express terms. App. 22, 23. Maldonado's federal complaint was filed on July 2,

2002. App. 63. That complaint alleges federal question jurisdiction under the First Amendment to the United States Constitution. App. 63. In the prayer for relief, it requests a permanent injunction to prohibit "any attempt by defendant to enforce any injunction based upon said Business and Professions Code sections." App. 77, 78.

The state court injunction functions as a prior restraint upon certain forms of commercial speech and thus represents quintessential Constitutional injury. Maldonado knew with the injunction's issuance that he had suffered injury to his asserted free speech rights. His Section 1983 challenge on First Amendment grounds to the injunction and its prospective enforcement should have been brought within one year of the issuance of the injunction. The Ninth Circuit's analysis begins by first stating, "[b]ecause Maldonado filed the complaint in this case on July 2, 2002, any claims that had accrued before July 2, 2002, are barred by the statute of limitations." App. 17. Despite this assertion, the court did not find that Maldonado's challenge to enforcement of the 1999 injunction is time-barred. Instead, the court in addressing Maldonado's as-applied constitutional challenge to the newly-posted billboard display identified in his federal complaint (*see* App. 76) stated at App. 17:

> "It seems equally clear, however, that **Maldonado's challenge to the application of the COAA [California Outdoor Advertising Act] as to his current signs** – which he argues are non-commercial – is not barred by the statute of limitations, **since he alleges that he did not post those advertisements until a few days before the complaint was filed**." (Emphasis added).

In so holding, the court overlooks the state court injunction. By its terms, the 1999 injunction applies to future displays. Such future displays include "his current signs" posted in 2002. Therefore, the statute of limitations commenced upon issuance of the injunction. By ignoring the injunction for accrual purposes, the Ninth Circuit leaves statutorily-based state court injunctions forever subject to an as-applied constitutional challenge. In the Ninth Circuit's version, Maldonado could have challenged the 1999 injunction even decades later by simply posting a new billboard display and filing a lawsuit within one year of that posting.

Without citation to any authority, the court also allowed Maldonado to forever facially challenge, at any time, the statutes on which the state court injunction was based.

> "In this case, Caltrans had enforced the statute in the most narrow sense in 1998 when it brought a state nuisance action against Maldonado. We conclude, however, that the fact that the state court entered a permanent injunction against Maldonado constituted a continuing enforcement of the statute against Maldonado, such that he is allowed to raise a facial challenge to the statute at any time so long as the injunction continues to be in force." App. 18, 19.

If the Ninth Circuit's "continuing enforcement" theory is allowed to stand as precedent for facial challenges to statutes and the injunctions on which they are based, decades-old injunctions obtained by federal, state and local governmental agencies – often performing vital police

power functions – will forever be subject to challenge. This is not a precedent this Court should ignore.

CONCLUSION

The Court should grant the petition for writ of certiorari in order to avoid the disarray and disruption which will ensue from the Ninth Circuit's contrary interpretation of prevailing federal law.

Respectfully submitted,

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370 F.3d 945

Nano MALDONADO,
Plaintiff-Appellant,

v.

Tony HARRIS, in his capacity as Acting Director of the California Department of Transportation,*
Defendant-Appellee.

No. 03-15007.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted March 10, 2004.

Filed June 4, 2004.

Dennis Scott Zell, Janet Fogarty & Associates, Burlingame, CA, for the plaintiff-appellant.

Daniel P. Weingarten, Deputy Attorney, Dept. of Transportation, Legal Div., San Francisco, CA, for the defendant-appellee.

Appeal from the United States District Court for the Northern District of California; Charles R. Breyer, District Judge, Presiding. D.C. No. CV-02-03167-CRB.

Before B. FLETCHER, REINHARDT, Circuit Judges, and RESTANI, Judge.**

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* Pursuant to Rule 43(c)(2) of the Federal Rules of Appellate Procedure, Tony Harris, the Acting Director of Caltrans, has been substituted as Appellee for his predecessor, Jeff Morales. The Clerk will revise the docket in this case to reflect the substitution.

** The Honorable Jane A. Restani, Chief Judge of the United States Court of International Trade, sitting by designation.

BETTY B. FLETCHER, Circuit Judge.

Nano Maldonado appeals the district court's dismissal of his action under 42 U.S.C. § 1983, which raises several First Amendment challenges to California's Outdoor Advertising Act. The district court held that, insofar as Maldonado's constitutional claims were ripe for review, it lacked jurisdiction to review them under the *Rooker-Feldman* doctrine. The district court also held that some of Maldonado's challenges were precluded under California law because of Maldonado's failure to raise the claims in an earlier state proceeding. Based on these findings, the district court granted the defendant's motion to dismiss. Maldonado brought this timely appeal. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we reverse.

I. Background and Procedural History

This case is the latest chapter in a long-running dispute between Maldonado and the California Department of Transportation ("Caltrans").[1] Since 1991, Maldonado has owned a commercial building adjacent to U.S. Highway 101 in Redwood City, California, as well as a double-sided billboard that is mounted on the roof of the building. Caltrans is responsible for enforcing California's Outdoor Advertising Act ("COAA" or "the Act"), Cal. Bus. & Prof.Code §§ 5200-5486 (West 2003), which generally regulates advertising displays that are visible from and are placed near interstate and primary highways in California. *See* Cal. Bus. & Prof.Code § 5271.

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[1] We will refer to the defendant in this case as "Caltrans," even though the actual party defending the case is Tony Harris, the acting director of Caltrans.

In 1993, Maldonado applied to Caltrans for a permit to use his Redwood City billboard for off-premises advertising. The application was denied because Maldonado's billboard stands along a segment of Highway 101 classified as a "landscaped freeway." COAA prohibits billboard advertisements along landscaped freeways unless the advertisement is for products or services offered on the premises. *See* Cal. Bus. & Prof.Code §§ 5440, 5442.[2] Since the denial of the permit, Maldonado has been attempting to get around the restrictions in COAA. In 1996, Maldonado was cited by Caltrans for posting off-premises advertisements on the billboard. Maldonado challenged the citation administratively, contending that the advertisements at issue comported with COAA because the businesses involved had also leased space in the building. The administrative board rejected Maldonado's contentions.

Because Maldonado persisted in his off-premises advertising, Caltrans brought a state nuisance suit against him in July 1998. In his answer, Maldonado raised a number of defenses under state law, but both sides agree that he did not raise any arguments regarding the constitutionality of the Act. After a bench trial, the state trial court entered judgment against Maldonado including a permanent injunction generally restricting his ability to post further advertisements on his billboard. Maldonado's appeals to California's appellate courts were rejected. *See People ex rel. Dep't of Transp. v. Maldonado,* 86 Cal.App.4th 1225, 104 Cal.Rptr.2d 66 (2001). At no time

[2] The statute also allows advertisements offering the property on which they are situated for sale or lease, or which simply identify the owner or occupant of the building. *See* § 5442.

did Maldonado raise federal constitutional claims during the litigation.

Despite the state court rulings, Maldonado continued to test the advertising restrictions in the Act. He has twice been found in contempt of the state court injunction. Shortly before filing the complaint in this case, he posted a sign – which he describes as "political/religious" – which includes the messages "IN GOD WE TRUST"; "WE PRAY FOR WORLD PEACE"; and "HELP STOP TERRORISM." The sign also lists the phone numbers for the San Mateo County Sheriff's Department, the F.B.I. and the Red Cross, and also adds the message "Available for on site use" and a phone number. On the other side of the billboard, Maldonado posted a sign from the non-profit group Habitat for Humanity.

On July 2, 2000, Maldonado filed the instant action in the District Court for the Northern District of California. Maldonado's complaint alleged that the Act violated the First Amendment on its face and as it had been applied to him and his various advertisements. Maldonado sought a permanent injunction restraining enforcement of the Act, including any attempts by Caltrans to "enforce any injunction based upon" the Act.

Caltrans moved to dismiss the case on various grounds and the district court granted the motion. The district court concluded that Maldonado lacked standing to challenge the provisions of the Act dealing with permits and scenic highways, a conclusion that Maldonado does not challenge in this appeal. The district court also found that Maldonado's constitutional challenge on the prohibition of "off-premises" commercial advertising was barred by claim preclusion. Finally, the district court found that,

to the extent they were ripe for review, all of Maldonado's claims were barred by the *Rooker-Feldman* doctrine.

Maldonado filed a timely notice of appeal.

II. Standard of Review

We review a district court's dismissal of an action de novo, whether the dismissal is based on claim preclusion, ripeness or the *Rooker-Feldman* doctrine. *Stewart v. U.S. Bancorp,* 297 F.3d 953, 956 (9th Cir.2002); *Ross v. Alaska,* 189 F.3d 1107, 1114 (9th Cir.1999); *Olson Farms, Inc. v. Barbosa,* 134 F.3d 933, 936 (9th Cir.1998). We may affirm a dismissal on any basis supported by the record, even if the district court relied on different grounds or reasoning. *Groten v. California,* 251 F.3d 844, 851 (9th Cir.2001).

III. Discussion

A. *Rooker-Feldman* Doctrine

The district court found that all of Maldonado's challenges to COAA were barred by the *Rooker-Feldman* doctrine.[3] The basic premise of *Rooker-Feldman* is that "a federal district court does not have subject matter jurisdiction to hear a direct appeal from the final judgment of a state court." *Noel v. Hall,* 341 F.3d 1148, 1154 (9th Cir.2003). *Rooker-Feldman* recognizes the implicit statutory structure established by Congress, which has determined that the United States Supreme Court is the only

[3] The doctrine takes its name from *Rooker v. Fidelity Trust Co.,* 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923), and *D.C. Court of Appeals v. Feldman,* 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983).

federal court with jurisdiction to hear appeals from state courts. *See* 28 U.S.C. § 1257; *Noel,* 341 F.3d at 1154-55.

We recently recognized that, while the basic premise of the *Rooker-Feldman* doctrine is relatively simple, it has not been applied consistently in the lower federal courts. *Noel,* 341 F.3d at 1162-63. In *Noel,* we set forth a general formulation of *Rooker-Feldman* to attempt to clarify the scope of the doctrine. We explained that

> [i]f a federal plaintiff asserts as a legal wrong an allegedly erroneous decision by a state court, and seeks relief from a state court judgment based on that decision, *Rooker-Feldman* bars subject matter jurisdiction in federal district court. If, on the other hand, a federal plaintiff asserts as a legal wrong an allegedly illegal act or omission by an adverse party, *Rooker-Feldman* does not bar jurisdiction.

Id. at 1164. We further noted that even if a federal suit was not barred by *Rooker-Feldman*, it might nonetheless be claim-precluded under res judicata principles. *Id.* We cautioned, however, that the issue of claim preclusion is distinct from the *Rooker-Feldman* question. *Id.*

When we apply the *Noel* formulation of the *Rooker-Feldman* doctrine to the facts of this case, it becomes clear that the doctrine does not deprive the district court of jurisdiction over any of Maldonado's claims. The legal wrong that Maldonado asserts in this action is not an erroneous decision by the state court in the nuisance suit brought against Maldonado by Caltrans, but the continued enforcement by Caltrans of a statute Maldonado asserts is unconstitutional. In other words, Maldonado asserts as a legal wrong "an allegedly illegal act . . . by an adverse

party." *Noel,* 341 F.3d at 1164. Under these circumstances, *Noel* makes clear that *Rooker-Feldman* does not apply.

The district court relied on a passage in *Fontana Empire Center, LLC v. City of Fontana,* 307 F.3d 987, 992 (9th Cir.2002), where we stated that the *Rooker-Feldman* doctrine "precludes a federal district court from exercising jurisdiction over general constitutional challenges that are 'inextricably intertwined' with claims asserted in state court." We recognize that this statement in *Fontana* can be misleading when it is read out of context. However, as we explained in *Noel,*

> [t]he premise for the operation of the "inextricably intertwined" test . . . is that the federal plaintiff is seeking to bring a forbidden de facto appeal. The federal suit is not a forbidden appeal because it is "inextricably intertwined" with something. Rather, it is simply a forbidden de facto appeal. Only when there is already a de facto appeal in federal court does the "inextricably intertwined" test come into play: Once a federal plaintiff seeks to bring a forbidden de facto appeal, as in *Feldman,* the federal plaintiff may not seek to litigate an issue that is "inextricably intertwined" with the state judicial decision from which the forbidden de facto appeal is brought.

Noel, 341 F.3d at 1158. In this case, Maldonado is not bringing a forbidden de facto appeal because he is not alleging as a legal wrong an erroneous decision from the state court. *See id.* at 1164. Therefore, the "inextricably intertwined" test does not come into play.

Our conclusion remains the same even though Maldonado's complaint seeks relief from the injunction entered by the state court. In a recent decision we made clear that, even

when a federal plaintiff is expressly seeking to set aside a state court judgment, *Rooker-Feldman* may not apply. *See Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1140(9th Cir.2004). In *Kougasian,* the federal plaintiff sought to set aside two state court judgments on the ground that its adversary had committed extrinsic fraud on the state court. We rejected the district court's conclusion that *Rooker-Feldman* barred the action, noting that, for *Rooker-Feldman* to apply, "a plaintiff must seek not only to set aside a state court judgment; he or she must also allege a legal error by the state court as the basis for that relief." *Kougasian,* 359 F.3d at 1140. As we have already explained, Maldonado does not allege any legal errors by the California state court as a basis for relief, and *Rooker-Feldman* therefore does not bar his federal action.

B. Claim Preclusion

The district court found that some of Maldonado's constitutional challenges to COAA were barred by claim preclusion because he had failed to raise them in the earlier state nuisance action. 28 U.S.C. § 1738 generally requires federal courts to give state court judgments the same res judicata effect that they would be given by another court of that state. *Migra v. Warren City Sch. Dist. Bd. of Ed.*, 465 U.S. 75, 84, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984); *Albano v. Norwest Fin. Haw., Inc.*, 244 F.3d 1061, 1063 (9th Cir.2001). We must therefore look to California law to determine the preclusive effect of the state court judgment entered against Maldonado. *Albano,* 244 F.3d at 1063. Caltrans argues that Maldonado's claims are barred under two different aspects of California law: California's compulsory cross-complaint statute and common law claim preclusion principles.

1. Claim Preclusion Under California's Compulsory Cross-Complaint Statute

California's compulsory cross-complaint statute provides that, except for some situations not relevant here,

> if a party against whom a complaint has been filed and served fails to allege in a cross-complaint any related cause of action which (at the time of serving his answer to the complaint) he has against the plaintiff, such party may not thereafter in any other action assert against the plaintiff the related cause of action not pleaded.

Cal.Civ.Proc.Code § 426.30 (West 1973 & Supp.2004). The statute elsewhere defines "related cause of action" as "a cause of action which arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause of action which the plaintiff alleges in his complaint." Cal.Civ.Proc.Code § 426.10(c).

At first glance, the compulsory cross-complaint provision appears to bar at least some of Maldonado's claims. Maldonado's current constitutional challenges to COAA were certainly "related causes of action," within the meaning of the statute, to the state nuisance action that Caltrans brought against Maldonado in 1998. On closer inspection, however, it becomes clear that the cross-complaint provision is inapplicable in this case. Section 426.30 requires a defendant in a state court action in California to raise any related causes of action which he has against the *plaintiff* in that action. The plaintiff in the 1998 nuisance action against Maldonado was Caltrans. *See People ex rel. Dep't of Transp. v. Maldonado,* 86 Cal.App.4th 1225, 104 Cal.Rptr.2d 66 (2001). Maldonado, however, could not have filed a cross-complaint against Caltrans under 42 U.S.C. § 1983 raising the constitutional

challenges he raises here. State agencies (such as Caltrans) are not "persons" within the meaning of § 1983, and are therefore not amenable to suit under that statute. *Will v. Mich. Dep't of State Police,* 491 U.S. 58, 70, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). In other words, Maldonado had no "cause of action" against Caltrans under § 1983. We recognize that Maldonado could have brought a cross-complaint under § 1983 against the director of Caltrans as part of the 1998 nuisance action. *See* Cal.Civ.Proc.Code § 428.10(b) (allowing permissive cross-complaints against parties other than the original plaintiff). The fact that Maldonado *could* have brought a cross-complaint, however, does not mean that he was *required* to do so. *See Banerian v. O'Malley,* 42 Cal.App.3d 604, 116 Cal.Rptr. 919, 924 (1974) (stating that, "[e]xcept as between plaintiffs and defendants, there is no compulsory cross-complaint in California procedure," and that a cross-complaint is permissive between parties and nonparties). Under the plain language of § 426.30, Maldonado was not required to bring a § 1983 action against the director of Caltrans because the director was not the plaintiff in the state nuisance action.[4]

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[4] We note that our reading of § 426.30 is consistent with the California courts' recognition that preclusion provisions like the compulsory cross-complaint statute should be read narrowly. *See Datta v. Staab,* 173 Cal.App.2d 613, 343 P.2d 977, 980 (1959) (stating that the predecessor to § 426.30 "should be narrowly construed"); *see also Carroll v. Import Motors, Inc.,* 33 Cal.App.4th 1429, 39 Cal.Rptr.2d 791, 796 (1995) (noting, in the context of § 426.30, that "equity abhors a forfeiture").

2. Common Law Claim Preclusion

The district court found that Maldonado's claims were also barred under common law principles of claim preclusion. In California, a final judgment precludes further proceedings if they are based on the same cause of action. *Eichman v. Fotomat Corp.*, 759 F.2d 1434, 1438 (9th Cir.1985). California courts employ the "primary rights" theory to determine what constitutes the same cause of action for claim preclusion purposes:

> [A] cause of action is comprised of a primary right of the plaintiff, a corresponding primary duty of the defendant, and a wrongful act by the defendant constituting a breach of that duty. The most salient characteristic of a primary right is that it is indivisible: the violation of a primary right gives rise to but a single cause of action. . . . As far as its content is concerned, the primary right is simply the plaintiff's right to be free from the particular injury suffered.

Mycogen Corp. v. Monsanto Co., 28 Cal.4th 888, 123 Cal.Rptr.2d 432, 51 P.3d 297, 306-07 (2002) (quoting *Crowley v. Katleman*, 8 Cal.4th 666, 34 Cal.Rptr.2d 386, 881 P.2d 1083, 1090 (1994) (citations and internal quotations omitted)). If the "primary right" sought to be vindicated in a subsequent litigation is the same as that in an earlier suit, the second action will be claim precluded under California law. *See Mycogen Corp.*, 123 Cal.Rptr.2d 432, 51 P.3d at 306.

The district court found Maldonado's constitutional claims barred because it concluded that the same primary right was involved in both the 1998 state nuisance suit and the instant action, namely, Maldonado's right to engage in off-premises advertisement on his billboard.

This conclusion stems from a misreading of California law, however. The primary right in the state nuisance action was not Maldonado's right to advertise on his billboard, but the right of the people of California to be free from obtrusive advertising displays along major highways. This was a statutory right that had been created by the state's Legislature. *Cf.* Cal. Bus. & Prof.Code § 5226 (stating that regulation of highway advertisements was necessary "to promote the public safety, health, welfare, convenience and enjoyment of public travel . . . "). On the other hand, the primary right involved in the instant action is the one identified by the district court: Maldonado's right to advertise freely on his property, a right that Maldonado claims is protected by the First Amendment. Because the primary rights involved in the two suits are different, the causes of action are also different, and the judgment against Maldonado in the nuisance action therefore does not bar any of his federal claims.

The decision of the California Court of Appeal in *Morris v. Blank,* 94 Cal.App.4th 823, 114 Cal.Rptr.2d 672 (2001), supports our conclusion. In *Morris,* the original plaintiff, Morris, filed a negligence action against Blank in state superior court following a car accident. While this suit was pending, Blank filed a negligence action in municipal court against Morris, which Blank was able to settle with Morris' insurer. Blank then went back to superior court and claimed that the settlement of the municipal court action barred the action Morris had initially filed. The trial court agreed and dismissed Morris' suit. The California Court of Appeal reversed, finding that claim preclusion did not bar Morris' superior court action because the causes of action were not identical: "Here, Morris' superior court litigation is on a different cause of

action . . . involving separate and distinct torts, namely, Blank's negligence, from those at issue in Blank's municipal court case, namely, Morris' negligence." *Morris,* 114 Cal.Rptr.2d at 678 (internal quotations omitted). *Morris* illustrates that, even though two suits involve the same nucleus of facts, they do not necessarily raise the same cause of action under California law. *See also Branson v. Sun-Diamond Growers,* 24 Cal.App.4th 327, 29 Cal.Rptr.2d 314, 321 n. 6 (1994) (refusing to apply a "nucleus of facts" test for claim preclusion purposes).

The district court therefore erred in dismissing Maldonado's claims on the ground that they are barred by claim preclusion under California law.

C. Ripeness

The district court concluded that, to the extent that the *Rooker-Feldman* doctrine did not apply, Maldonado's challenge to the application of COAA to his current advertisements was not ripe because it was unclear whether the statute would be enforced against those advertisements.

In *Thomas v. Anchorage Equal Rights Comm'n,* 220 F.3d 1134 (9th Cir.2000) (en banc), we set out a framework to analyze whether a constitutional challenge to a state statute before its enforcement was ripe for review. We explained that the ripeness inquiry focuses on two different components: a constitutional component and a prudential component. *Id.* at 1138. The constitutional component of the inquiry focuses on three factors: (1) whether the plaintiffs have articulated a "concrete plan" to violate the law in question, (2) whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings, and (3) the history of past prosecution or

enforcement under the challenged statute. *Id.* at 1139. Maldonado's suit fares well as far as the first and third factors are concerned: Maldonado alleges that his current conduct is in violation of COAA,[5] and Caltrans has undoubtedly enforced the statute against Maldonado in the past. Although the second factor is a closer question, it also tends to favor Maldonado: while there may not have been specific threats of enforcement against his current signs, the fact that an injunction had been entered against Maldonado certainly qualifies as a threat of enforcement. We therefore conclude that Maldonado's First Amendment challenge meets the constitutional component of ripeness.

In *Thomas,* we also pointed to a prudential component of ripeness, and we noted that the analysis of this component was guided by two considerations: "the fitness of the issues for judicial decision and the hardship to the parties

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[5] Counsel for Caltrans asserted at oral argument that COAA does not apply to non-commercial advertisements, although he could point to nothing in the statute in support of that assertion. California's Attorney General has stated that the Act "does not apply to the posting of a sign on private property adjacent to a highway that expresses the property owner's opinion concerning a state or federal public official." 79 Ops. Cal. Atty. Gen. 117 (1996). While the Attorney General's opinion also expresses doubt that the Act applies to noncommercial messages generally, *see id.* at 3-4, the actual question it dealt with was much narrower. Moreover, while the Attorney General's opinions are given substantial weight by the California courts, they are not considered controlling. *See Thorning v. Hollister Sch. Dist.,* 11 Cal.App.4th 1598, 15 Cal.Rptr.2d 91, 94 (1992). In any event, nothing in the statute creates an exception for non-commercial advertisements and no controlling caselaw has construed the Act in the manner Caltrans suggests. *Cf.* Cal. Bus. & Prof.Code §§ 5202, 5203 and 5221 (defining "advertising displays" broadly with only narrow exceptions not including non-commercial advertisements), and Cal. Bus. & Prof.Code § 5440 (providing that "no advertising display" shall be placed adjacent to a landscaped freeway except as provided in the Act).

of withholding court consideration." *Thomas,* 220 F.3d at 1141 (quoting *Abbott Labs. v. Gardner,* 387 U.S. 136, 149, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967)). Maldonado's suit meets the first prong because there has been no contention that the record needs to be developed further in order for the district court to be able to address the constitutional challenge. *See City of Auburn v. Qwest Corp.,* 260 F.3d 1160, 1172 (9th Cir.2001) ("If a controversy is essentially legal in nature, it is fit for judicial decision.") (*quoting W. Oil & Gas Ass'n v. Sonoma County,* 905 F.2d 1287, 1291 (9th Cir.1990)) (internal quotation and citation omitted). The second factor also weighs in favor of Maldonado because withholding consideration of his claims will require him to risk being found in contempt of the state court injunction in order to be able to challenge the constitutionality of the statute. *Cf. City of Auburn,* 260 F.3d at 1171 ("If promulgation of the challenged regulations presents plaintiffs with the immediate dilemma to choose between complying with newly imposed, disadvantageous restrictions and risking serious penalties for violation, the controversy is ripe.") (quoting *Reno v. Catholic Soc. Servs., Inc.,* 509 U.S. 43, 57, 113 S.Ct. 2485, 125 L.Ed.2d 38 (1993)). Maldonado's suit therefore also meets the prudential component of ripeness.

In sum, we hold that Maldonado's constitutional claims are ripe for review.

D. Statute of Limitations

Finally, Caltrans argues that Maldonado's First Amendment challenges are barred by the statute of limitations applicable to § 1983 actions. The district court did not reach this issue because it had disposed of all of

Maldonado's claims on other grounds. Nonetheless, we examine this issue to determine whether we can affirm the district court's dismissal of Maldonado's claims on this ground. *See Groten v. California,* 251 F.3d 844, 851 (9th Cir.2001).

In determining the proper statute of limitations for actions brought under 42 U.S.C. § 1983, we look to the statute of limitations for personal injury actions in the forum state. *See Azer v. Connell,* 306 F.3d 930, 935 (9th Cir.2002). We have therefore held that California's one-year statute of limitations for personal injury actions applies to § 1983 suits in federal court. *See DeGrassi v. City of Glendora,* 207 F.3d 636, 644 (9th Cir.2000). California's legislature, however, has recently revised the relevant statute of limitations, extending it to two years. *See* 2002 Cal. Legis. Serv. Ch. 448 (S.B.688) (West); Cal.Civ.Proc.Code § 335.1 (West Supp.2004). Maldonado argues that we should apply the two-year period. The extension of the statute of limitations, however, did not become effective until January 1, 2003, several months after Maldonado filed his complaint. Under California law, an extension of a statute of limitations will not apply to claims already barred under the prior statute of limitations unless the Legislature explicitly provides otherwise. *See Douglas Aircraft Co. v. Cranston,* 58 Cal.2d 462, 24 Cal.Rptr. 851, 374 P.2d 819, 822 (1962); *see also W. Sec. Bank, N.A. v. Superior Court,* 15 Cal.4th 232, 62 Cal.Rptr.2d 243, 933 P.2d 507, 513 (1997) ("A basic canon of statutory interpretation is that statutes do not operate retrospectively unless the Legislature plainly intended them to do so."). In enacting the new two-year statute of limitations, the California Legislature made it applicable retroactively only to the victims of the terrorist attacks of September 11,

2001. *See* 2002 Cal. Legis. Serv. Ch. 448, § 4 (S.B.688) (West). The recent extension is therefore inapplicable to Maldonado's claims, and we consider the question under the one-year period. *Accord Krupnick v. Duke Energy Morro Bay, LLC,* 115 Cal.App.4th 1026, 9 Cal.Rptr.3d 767 (2004) (holding that 2-year statute of limitations did not apply retroactively to claims already barred).

Because Maldonado filed the complaint in this case on July 2, 2002, any claims that had accrued before July 2, 2001 are barred by the statute of limitations. Federal law determines when a civil rights claim accrues. *Knox v. Davis,* 260 F.3d 1009, 1013 (9th Cir.2001). "Under federal law, a claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action." *Id.* (quoting *TwoRivers v. Lewis,* 174 F.3d 987, 992 (9th Cir.1999)). Under this standard, we find it clear that, to the extent that Maldonado challenges the application of COAA to the indisputably commercial signs he posted in the mid-1990s, the statute of limitations bars his claims. Maldonado certainly knew that Caltrans was enforcing COAA against his off-premises commercial advertisements by the time Caltrans filed a nuisance suit against him in July 1998. It seems equally clear, however, that Maldonado's challenge to the application of COAA as to his current signs – which he argues are non-commercial – is not barred by the statute of limitations, since he alleges that he did not post those advertisements until a few days before the complaint was filed.

A more difficult question is whether Maldonado's facial challenge of the statute is barred by the statute of limitations. In fact, whether a statute of limitations for § 1983 actions can bar a facial challenge under the First Amendment to a state statute appears to be a question

that has not been conclusively resolved by any Circuit court. We join the Fourth Circuit in expressing serious doubts that a facial challenge under the First Amendment can ever be barred by a statute of limitations, *see Nat'l Adver. Co. v. City of Raleigh*, 947 F.2d 1158, 1168 (4th Cir.1991),[6] but we need not resolve the broader question here because we conclude that, under the circumstances present in this case, the statute of limitations does not bar Maldonado's facial challenge. In *RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1063 (9th Cir.2002), we held that the district court had erred in dismissing a First Amendment facial challenge because the statute had actually been enforced against the plaintiffs during the statute of limitations period. In this case, Caltrans had enforced the

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[6] We note that a significant number of district courts have held that facial challenges under the First Amendment are not subject to the statutes of limitation applicable to § 1983 actions. *See Napa Valley Publishing Co. v. City of Calistoga*, 225 F.Supp.2d 1176, 1184 (N.D.Cal.2002); *Frye v. City of Kannapolis*, 109 F.Supp.2d 436, 439-40 (M.D.N.C.1999); *Lavey v. City of Two Rivers*, 994 F.Supp. 1019, 1023 (E.D.Wis.1998), *aff'd*, 171 F.3d 1110 (7th Cir.1999); *3570 East Foothill Blvd., Inc. v. City of Pasadena*, 912 F.Supp. 1268, 1278 (C.D.Cal.1996); *Santa Fe Springs Realty Corp. v. City of Westminster*, 906 F.Supp. 1341, 1364-65 (C.D.Cal.1995).

We also note that facial challenges under the First Amendment are fundamentally different from those brought under the Takings Clause. In the latter context, we have held that a statute of limitations can bar facial challenges. *See Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 687-88 (9th Cir.1993). However, as we explained in *Levald*,

> [i]n the takings context, the basis of a facial challenge is that the very enactment of the statute has reduced the value of the property or has effected a transfer of a property interest. This is a single harm, measurable and compensable when the statute is passed. Thus, it is not inconsistent to say that different rules adhere in the facial takings context and other contexts.

Id. at 688.

statute in the most narrow sense in 1998 when it brought a state nuisance action against Maldonado. We conclude, however, that the fact that the state court entered a permanent injunction against Maldonado constituted a continuing enforcement of the statute against Maldonado, such that he is allowed to raise a facial challenge to the statute at any time so long as the injunction continues to be in force.

We therefore hold that the statute of limitations does not bar Maldonado's facial challenge to COAA, nor his as-applied challenge relating to the current, allegedly non-commercial advertisements.

IV. Conclusion

We hold that the district court erred in dismissing Maldonado's challenges to California's Outdoor Advertising Act on the ground that they were barred on *Rooker-Feldman*, claim preclusion or ripeness grounds. We also hold that Maldonado's challenge to his earlier, indisputably-commercial signs is barred by the statute of limitations, but that his facial challenge to the statute and his as-applied challenge relating to non-commercial advertisements are not barred. We therefore reverse the dismissal of Maldonado's § 1983 action and remand so that Maldonado's claims may be heard on the merits.

REVERSED and REMANDED.

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND OF THE COUNTY OF SAN MATEO

PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the DEPARTMENT OF TRANSPORTATION, Plaintiff, v. NANO MALDONADO, Defendant.	No. 405466 **JUDGMENT GRANTING INJUNCTIVE RELIEF** (Filed Oct. 27, 1999)

The complaint of plaintiff PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the DEPARTMENT OF TRANSPORTATION, for declaratory and injunctive relief came on regularly for trial before the court on May 11, 1999, in Department 22, The Honorable Barbara J. Mallach, judge presiding. Plaintiff was represented by attorney David N. Sandler, Esq., and defendant Nano Maldonado appeared and was represented by attorney Dan Cory Clapp, Esq.

Prior to commencement of trial defendant moved for a jury trial. This issue was argued before the court, and, based upon authority set forth in Code of Civil Procedure sections 525 and 1060, defendant's motion was denied and trial proceeded before the court.

Both parties submitted trial briefs and memoranda of points and authorities, witnesses were called for both sides, and the matter submitted to the court for decision on May 17, 1999. The court being fully advised in the premises, and having issued its Statement of Decision on July 21, 1999, now, therefore,

IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Defendant's 1993 application, for a permit to display outdoor advertising, was properly denied by plaintiff under authority of Business and Professions Code section 5440, which prohibits outdoor advertising adjacent to landscaped freeways;

2. Beginning in 1993 and continuing through 1996 defendant displayed advertising for the Holiday Inn in Palo Alto, Stanford Shopping Center in Palo Alto, Stanford University athletic tickets, Skyway Cellular, and Golden Time Jewelers in Redwood City. Plaintiff issued citations to defendant in October, 1993 and October, 1996 demanding that defendant remove the above displays on grounds they were posted without a permit for outdoor advertising as well as being displayed adjacent to a landscaped freeway. The court finds that plaintiff's citations were proper and that defendant's displays were not permissible "on-site" advertising for reasons set forth below.

3. Defendant required that each of the above advertisers rent office space in his warehouse as a condition to advertising on his billboard. Defendant argued that the tenants/advertisers became "occupants of the premises" for purposes of Business and Professions Code section 5442(b), which, as an exception to section 5440, allows occupants of the premises to display "on-premise" advertising without a permit. The court, after due deliberation, finds that section 5442(b) should be interpreted in context with its companion section 5442(c), which allows on-premise advertising by owners or occupants if the display is used exclusively to advertise goods manufactured or produced, or services rendered, on the premises. With respect to defendant's tenants' displays, none of them advertised goods manufactured or produced, or services rendered, on the premises. Rather, each of the displays directed the viewer to other, off-premise, locations. Accordingly, none of these displays can be considered on-premise advertising within the meaning of the statute.

4. The court therefore grants injunctive relief to plaintiff, and defendant is hereby enjoined and restrained from committing any of the following acts, directly or indirectly:

a. Posting or displaying any advertising on his billboard without first having obtained from plaintiff either a permit for outdoor advertising, or an exemption from or waiver of the permit requirement;

b. Posting or displaying any "on premise" advertising which does not direct the viewer to the billboard location for purposes of conducting business;

c. Posting or displaying any "on premise" advertising for products or services which are only incidental or

secondary to the principal business activity conducted on defendant's premises;

d. Posting or displaying any "on premise" advertising for activities not conducted on defendant's premises. Renting of office space by an advertiser does not, for purposes of these orders, constitute conducting business or conducting activities on defendant's premises.

Dated: 10-20-99.

/s/ Barb J. Mallach
JUDGE OF THE
SUPERIOR COURT

APPROVED AS TO FORM:

Dated:

DAN CORY CLAPP, ESQ.
Attorney for Defendant

86 Cal.App.4th 1225; 104 Cal.Rptr.2d 66 [Jan. 2001]

[No. A089538. First Dist., Div. Five. Jan. 10, 2001.]

THE PEOPLE ex rel. DEPARTMENT OF TRANSPORTATION, Plaintiff and Respondent, v. NANO MALDONADO, Defendant and Appellant.

[Opinion certified for partial publication.*]

COUNSEL

Terry J. Traktman for Defendant and Appellant:

Breland C. Gowan, David Gossage, Antonio R. Anziano, David N. Sandler and Daniel P. Weingarten for Plaintiff and Respondent.

OPINION

JONES, P. J. – In an action brought by the Department of Transportation (Caltrans) to abate a public nuisance, Nano Maldonado appeals a judgment in favor of Caltrans restricting the advertising Maldonado may display from his property. He contends the trial court misconstrued the statutes applicable to outdoor advertising; the injunction imposed by the judgment is ambiguous; and the trial court abused its discretion in denying him leave to file a claim for inverse condemnation.

BACKGROUND

This case concerns the advertising permitted on a billboard located on the roof of a commercial building

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* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of part III.2.

known as 3600 Rolison Road and located immediately adjacent to the southbound lanes of Highway 101 in Redwood City.

In 1956, a double-sided billboard was mounted on the roof of the building. During the 1960's and 1970's, the billboard was used for off-premises advertising, i.e., goods and services not located in the 3600 Rolison Road building. In 1990 or 1991 appellant purchased the building.

In March 1993, appellant applied to Caltrans for a permit to use the billboard for an off-premise display. In April 1993, Sally Barton, a Caltrans outdoor advertising inspector, denied the permit because the proposed advertisement would be along a segment of Highway 101 classified as "landscaped freeway." The Outdoor Advertising Act (the Act; Bus. & Prof. Code, § 5200 et seq.)[1] generally prohibits billboards along segments of freeway classified as landscaped, unless they advertise goods or services available at the property on which the billboard is placed. (§§ 5440, 5442.) In denying appellant's permit, Barton informed him that such "on-premises" advertising was permissible.

On October 14, 1993, Barton cited appellant for violating the Act by not having a permit and using his billboard to advertise off-premise goods and services on a landscaped freeway. He was instructed to correct the violation or contact Caltrans by December 4, 1993.

On October 26, 1996, Barton cited appellant on the same grounds and instructed him to remove the advertising

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[1] Unless otherwise indicated, all further section references are to the Business and Professions Code.

by November 30, 1996. Photographs taken by Barton of the subject billboard during this 1993-1996 period depict advertisements for the Stanford Shopping Center; a Palo Alto Holiday Inn; Skyway Cellular, with a telephone number at an El Camino Real address; Golden Time Jewelers, at 2074 Broadway, Redwood City; and Stanford University football tickets. Barton also visited the premises and saw only an automotive repair shop on one side of the building; she was unable to gain access to the rest of the building.

Pursuant to the 1996 citation's advisory, appellant requested a review of the citations by the California Outdoor Advertising Review Board (COARB). He asserted the advertisements were permissible because they were for businesses that leased space in his building. COARB concluded that the displays on appellant's billboard advertised off-premises goods and services and so violated the Act. Because appellant did not remove the displays, Caltrans brought the instant action to abate a public nuisance.

At trial, appellant testified that he did not know the nature of the business conducted in his building by the Palo Alto Holiday Inn, Stanford Shopping Center, Skyway Cellular or Golden Time Jewelers. He was unaware of these businesses ever, respectively, offering meals or accommodation, opening a shopping annex, selling cellular telephones, or selling watches at his building. As a condition to leasing the billboard to advertise their product or service, he required these lessees to lease an office in the building, because Barton's April 1993 letter denying a permit stated that on-premise advertising did not require a permit. When the lease was executed, he gave the

lessees a key and "quiet enjoyment," and they were entitled to use the office as they wanted.

Lee Nim, the owner of Golden Time Jewelers, testified that he contacted appellant after seeing the word "available" and a phone number on the billboard. While they negotiated the lease for the billboard, appellant told Nim that he could use an office in the building. Nim replied he was interested only in advertising on the billboard. He never received a key. The billboard depicted a Brighton link watch above the name, address and telephone number of Golden Time Jewelers.

Robert Carruesco, an assistant athletic director in charge of marketing for Stanford University athletics, contacted appellant about renting the billboard when he noticed that it was available for rent while driving past the property. Carruesco was only interested in using the billboard for three months to advertise football, but when appellant informed him the rental of the billboard included an office which Stanford would need to use, he agreed to the term. During the rental period Carruesco made the office available to a student intern, who used it occasionally but not for any football purpose. The billboard advertised the Stanford football season and contained a telephone number for the ticket office at the football stadium, which is in Palo Alto. Stanford did not operate a ticket office in its office in appellant's building.

Clement Chen, whose family owns the Palo Alto Holiday Inn, also saw that the billboard was available while driving past it. When Chen telephoned the posted number to inquire about renting it, appellant explained that the billboard was unavailable to rent alone but was part of a package with an office, pursuant to an arrangement

with Caltrans. During the rental period the hotel's director of sales and marketing used the office occasionally for additional office space. The Palo Alto Holiday Inn billboard directed viewers to the Embarcadero freeway exit (in Palo Alto) to reach the hotel and advertised that "kids eat free."

The trial court concluded that appellant's 1993 permit application was properly denied because it was for proscribed outdoor advertising adjacent to a landscaped freeway. It also concluded the advertising displays that formed the bases for the citations were not permissible on-site advertising even though appellant required each advertiser to rent office space as a condition to advertising on his billboard, because none of the lessees advertised goods manufactured or produced or services available on the premises.

The court then enjoined appellant from displaying any advertising on his billboard without permission from Caltrans and generally enjoined him from displaying any on-premise advertising unless it was for business actually conducted on the premises.

DISCUSSION

The primary issues on appeal are (1) whether the essentially undisputed facts demonstrate a violation of the applicable provisions of the Act, and (2) if so, whether the resulting injunction is sufficiently definite and comports with the Act.

I. *Violations of the Act*

The Act governs the placement of advertising displays within 660 feet from the edge of a right-of-way to a highway.

(§§ 5270, 5271; Stats. 1999, ch. 818, § 1.) It generally precludes any person from placing an advertising display within the affected areas without first securing written permission from Caltrans. (§ 5350.) However, section 5272 provides that the Act does not apply to an advertising display used exclusively to designate the name of the owner or occupant of the premises or to advertise the business conducted, services rendered, or goods produced or sold on the property upon which the advertising display is placed and within 1,000 feet of the point on the property at which the business is conducted, service rendered, etc. (§ 5272, subds. (c) & (d).)

Article 8 of the Act (§§ 5440-5443) regulates advertising displays on property adjacent to "landscaped freeways," which is defined as a section of freeway that is, or may be, improved by planting vegetation that requires reasonable maintenance on at least one side of its right of way. (§ 5216.) Section 5440 provides that "no advertising display may be placed or maintained on property adjacent to a section of a freeway that has been landscaped if the advertising display is designed to be viewed primarily by persons traveling on the main-traveled way of the landscaped freeway." Article 8 contains an exception, however, which is similar to the exceptions of section 5272, subdivisions (c) and (d). Under section 5442, the prohibition in section 5440 does not apply to any advertising structures or signs if the advertising display is used exclusively to designate the name of the occupant of the premises, or to advertise goods manufactured or produced, or services rendered, on the property upon which the advertising display is placed. (§ 5442, subds. (b) & (c).)

Any advertising display placed or existing in violation of the Act is a public nuisance and subject to removal.

(§ 5461; *People ex rel. Dept. of Transportation v. Outdoor Media Group* (1993) 13 Cal.App.4th 1067, 1076 [17 Cal.Rptr.2d 19].) Caltrans has authority, under the state's police power, to remove advertising displays that violate the Act after appropriate notice and hearing to the display owner. (§ 5463; *Traverso v. People ex rel. Dept. of Transportation* (1993) 6 Cal.4th 1152, 1161-1162 [26 Cal.Rptr.2d 217, 864 P.2d 488].)

There is no dispute that appellant's property lies adjacent to a section of freeway designated as "landscaped." Therefore, whether the challenged advertisements were permitted depended on whether they fit within the section 5442 exceptions to the proscription against advertisements alongside landscaped freeways. As the evidence demonstrates, they did not.

There was no evidence that the lessees of the billboard used the billboard to advertise goods they manufactured or produced or services they rendered in appellant's building. All the advertised goods and services were at other sites. (§ 5442, subd. (c).)

The fact that the billboard lease included the lease of an office in the building on which the billboard sits did not transform the lessees into occupants of the building for purposes of the Act. (§ 5442, subd. (b).) Whether a sign is a permissible outdoor advertising display is not determined by the subjective intent of the property owner but is a conclusion drawn from objective facts. (Cf. *People ex rel. Dept. of Transportation v. Harris* (1982) 128 Cal.App.3d 264, 269 [180 Cal.Rptr. 148] (*Harris*).) According to the record, only two of the leasing businesses ever occupied the office included in their lease, and those two – Stanford University athletics and Holiday Inn – did so only briefly

and for purposes wholly unrelated to the message of their advertising.

Furthermore, there was no evidence that the business Stanford University athletics or Holiday Inn conducted on their office in appellant's building was the principal activity conducted on his property or source of his income. The section 5442, subdivision (b) exception to the proscription against advertising on landscaped freeways requires the advertising display in question to be used "exclusively" to designate the name of the premises occupant. Caltrans's regulations implementing the Act provide that a display which advertises a brand name, trade name, product or service only incidental to the principal activity conducted on the property, or from which the property owner derives rental income, is not an on-premise display that fits within the section 5442 exception. (Cal. Code Regs., tit. 4, § 2243, subd. (c).) As the agency charged with administration of the Act, Caltrans's construction thereof is entitled to great weight. (*United Outdoor Advertising Co. v. Business, Transportation & Housing Agency* (1988) 44 Cal.3d 242, 246 [242 Cal.Rptr. 738, 746 P.2d 877].)

Caltrans's definition of what is *not* an on-premises display reflects the legislative intent of the Act, as manifested by the Act's plain meaning. (See *Kobzoff v. Los Angeles County Harbor/UCLA Medical Center* (1998) 19 Cal.4th 851, 861 [80 Cal.Rptr.2d 803, 968 P.2d 514].) Patently conveyed in the language of the Act is the requirement that there be a direct, ongoing, substantial relationship between the advertisement and the property on which it is located, so that people visiting the building will be able to obtain therein the goods and/or services in the advertisement.

Harris, supra, 128 Cal.App.3d 264 illustrates this legislative intent. Harris Farms, Inc., owned a large tract of land containing several agriculture enterprises and Harris Ranch Restaurant. A water tower alongside a highway on corporate property contained the sign "Harris Ranch 7 Miles." The tower was not within 1,000 feet of any commercial buildings or activity. The restaurant is seven miles south of the water tower. *Harris* concluded the sign violated the Act, even though it contained the name of the property owner, because it was intended to and did direct motorists to the restaurant seven miles away and thus constituted an advertisement for a business not located at the same site as the advertising display. (*Id.* at pp. 270-271.) Similarly, all the advertisements at issue on appellant's building directed motorists to goods and services unavailable at and distant from the lessee's office in the building.

Appellant argues that the determination of the signs' exemption from the Act is governed by section 5272, not section 5442, because section 5272 states that except for sections 5400 and 5404, nothing in the Act applies to advertising displays used for the purposes itemized in subdivisions (a) through (d) of section 5272. Appellant's argument is unavailing. The words of a statute are to be construed in context, so that each of its provisions is given significance, surplusage is avoided, and the provisions harmonize. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 [248 Cal.Rptr. 115, 755 P.2d 299]; *Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified Sch. Dist.* (1978) 21 Cal.3d 650, 659 [147 Cal.Rptr. 359, 580 P.2d 1155]; *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 231 [110 Cal.Rptr. 144, 514 P.2d 1224].) Courts must also avoid an interpretation that leads to absurd or

anomalous consequences. (*Calatayud v. State of California* (1998) 18 Cal.4th 1057, 1072 [77 Cal.Rptr.2d 202, 959 P.2d 360].)

To construe section 5272 as governing the determination of what advertisements are exempt from the proscription against advertising displays along *landscaped freeways* would deprive section 5442 of any meaning, leaving its words surplusage. By enacting an article within the Act specific to landscaped freeways, the Legislature clearly manifested its intent that designated landscaped highways are, for outdoor advertising purposes, to be considered separately from public highways generally.

In any case, the few varying words in the exceptions to the Act itemized in section 5272 and the exceptions to the proscription against advertising on landscaped freeways itemized in section 5442 constitute a distinction without a difference for purposes of the challenged advertisements in this case. Section 5272, subdivision (d) excepts "business conducted or services rendered or the goods produced or sold upon the property," and section 5442, subdivision (c) excepts "goods manufactured or produced, or services rendered. . . ." As outlined, *ante*, none of the challenged billboard advertisements depicted a business conducted, a service rendered or a product manufactured or sold on the premises.

II. *Language of Injunction*

Appellant contends the judgment must be reversed because the four activities enjoined thereby either confer on Caltrans extrastatutory authority or are ambiguous.

Paragraph 4a.

Paragraph 4a of the judgment enjoins appellant from "[p]osting or displaying any advertising on his billboard without first having obtained from plaintiff either a permit for outdoor advertising, or an exemption from or waiver of the permit requirement." We agree that paragraph 4a is contrary to the Act's requirements. So long as the portion of Highway 101 alongside appellant's property is designated "landscaped freeway," permits are irrelevant to any advertising thereon. As a general proposition, advertisements are not permitted on landscaped freeways at all. (§ 5440.) However, the section 5442 exceptions to section 5440's proscription are essentially synonymous with the kinds of advertising displays itemized in section 5272 as being wholly exempt from the Act. If the displays fall within an exception to the Act, they do not require a permit, as Caltrans acknowledges on appeal.

Nevertheless, Caltrans argues, the trial court had discretion to fashion an injunctive remedy to decrease the likelihood of a multiplicity of lawsuits,[2] given appellant's repeated violations of the Act. Although courts have flexible and expansive power to issue equitable relief, they do not have the power to disregard or set aside express terms of legislation. (*Armstrong v. Picquelle* (1984) 157 Cal.App.3d 122, 129 [203 Cal.Rptr. 552].) The court could not disregard the Act's provisions that its permit requirements are inapplicable to owners of property abutting

[2] Code of Civil Procedure section 526, subdivision (a) states: "An injunction may be granted in the following cases: [¶] . . . [¶] (6) Where the restraint is necessary to prevent a multiplicity of judicial proceedings."

landscaped freeways when the advertisements on their property fall within the statutory exceptions.

Paragraph 4b.

Paragraph 4b enjoins appellant from posting or displaying any " 'on premise' advertising which does not direct the viewer to the billboard location for purposes of conducting business." An injunction must be sufficiently definite to provide a standard of conduct for those whose activities are to be proscribed, as well as a standard for the court to use in ascertaining an alleged violation of the injunction. (*Pitchess v. Superior Court* (1969) 2 Cal.App.3d 644, 651 [83 Cal.Rptr. 35].) When read in the context of (1) the judgment as a whole, (2) the section 5442 exception allowing advertising for goods manufactured or services rendered on the premises, and (3) the holding of *Harris, supra*, 128 Cal.App.3d 264, the language of paragraph 4b is sufficiently definite to apprise appellant and the courts that he may not use his billboard to direct travelers to businesses that are not located in his building.

Paragraph 4c.

Paragraph 4c enjoins appellant from "[p]osting or displaying any 'on premise' advertising for products or services which are only incidental or secondary to the principal business activity conducted on [his] premises." Like paragraph 4b, this paragraph is sufficiently clear to reflect section 5442's requirement that the advertising be used "exclusively" to designate the occupant of the premises or goods and services available thereon, as well as the Caltrans regulation that a display that advertises a product or service only incidental to the property's principal

business is not an on-premise display. (Cal. Code Regs., tit. 4, § 2243, subd. (c).)

Paragraph 4d.

Paragraph 4d enjoins appellant from posting or displaying any " 'on premise' advertising for activities not conducted on [his] premises. Renting of office space by an advertiser does not, for purposes of these orders, constitute conducting business or conducting activities on [his] premises." This paragraph sufficiently defines the proscribed activity for the same reasons as does paragraph 4b. It manifests the requirements of the Act and the Caltrans regulations that there be a substantial physical relationship between the business advertised and the use of the premises made by that business.

III. *Other Issues*

1. *Presumption of Lawful Erection of Billboard*

Appellant contends he is allowed to use the billboard for off-premises advertising because it was lawfully erected for that purpose before enactment of the Act. Section 5216.1 generally defines a "lawfully erected" advertising display as one in compliance with state law in effect at the time of the display's erection. Section 5216.1 also states that there is a rebuttable presumption that an advertising display is lawfully erected if it has been in existence for five years or longer without the owner having received written notice during that time that the display was not lawfully erected.

However, section 5441, within the article governing landscaped freeways, states that any advertising display

"which is now, or hereafter becomes, in violation of Section 5440 [prohibiting advertising along landscaped freeways] shall be subject to removal three years from the date the freeway has been declared a landscaped freeway by [Caltrans] and the character of the freeway has been changed from a freeway to a landscaped freeway." Therefore, the fact that the billboard may have been lawfully erected for purposes of section 5216.1 became moot once the portion of Highway 101 alongside appellant's property was designated "landscaped" in 1993. Any advertising display that violates the Act is a public nuisance and subject to removal. (§ 5461.) A legislatively declared nuisance is subject to an injunction, even if the conduct that now constitutes the nuisance did not once do so. (*People ex rel. Dept. Pub. Wks. v. Adco Advertisers* (1973) 35 Cal.App.3d 507, 511 [110 Cal.Rptr. 849].) If the advertisements on appellant's billboard violated the Act's provisions governing landscaped freeways, they were subject to removal, whether or not the billboard could once have legally advertised off-premises goods and services.

2. *Leave to Amend**

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DISPOSITION

The judgment is modified to strike paragraph 4a thereof. In all other respects the judgment is affirmed. Costs on appeal to Caltrans.

Stevens, J., and Richman, J.,† concurred.

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* See footnote, *ante*, page 1225.

† Judge of the Alameda Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

A petition for a rehearing was denied February 1, 2001, and appellant's petition for review by the Supreme Court was denied March 28, 2001.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NANO MALDONADO,

Plaintiff,

v.

JEFF MORALES, in his capacity as Director of the California Department of Transportation,

Defendant. /

No. C 02-03167 CRB

MEMORANDUM AND ORDER

In this section 1983 action plaintiff challenges the constitutionality of California's "Outdoor Advertising Act" which limits freeway billboard advertising. After carefully considering the pleadings, and having had the benefit of oral argument on two occasions, the Court GRANTS defendant's request for judicial notice and GRANTS defendant's motion to dismiss.

BACKGROUND

A. Factual Background

Plaintiff owns a commercial building located at 3600 Rolison Road adjacent to the southbound lanes of Highway 101 in Redwood City, California. In the mid-1950's a double-sided billboard was mounted on the roof of the building. Plaintiff purchased the building in 1990 or 1991.

In March 1993 plaintiff applied to the California Department of Transportation ("Caltrans") for a permit to

use the billboard for an off-premise display. An off-premise display is a display advertising goods or services not offered at the location of the billboard. Caltrans denied the permit because the proposed advertisement would be along a segment of Highway 101 classified as "landscaped freeway." California's Outdoor Advertising Act, Business and Professions Code § 5200 *et seq.*, prohibits billboard advertising along a "landscaped freeway" unless the billboards advertise goods or services available at the property on which the billboard is placed ("on premises" advertising).

In October 1993 Caltrans cited plaintiff for violating the Act. He was cited again in 1996. Plaintiff subsequently sought review by the California Outdoor Advertising Review Board. Plaintiff argued that his billboards (advertising goods and services such as the Stanford Shopping Center, a Holiday Inn, Skyway Cellular and Stanford University football tickets) were on-premises advertising because the goods and services advertised were available on plaintiff's premises. The Board disagreed. Plaintiff still did not remove the offending advertisements and Caltrans filed suit in state court to abate a public nuisance, namely, the billboard advertisements.

After a trial the Superior Court found that the advertisements were for "off-premises goods and services." The court rejected plaintiff's argument that because he made an office available on the premises to those who advertised their goods and services, the advertisements were for on-premises goods and services. The court entered an injunction enjoining plaintiff from displaying any advertising on his billboard that is not truly on-premises advertising, as more fully defined in the order.

Plaintiff appealed and the appellate court affirmed. The California Supreme Court denied review on March 28, 2001. Despite the state court rulings, plaintiff did not remove the signs. On June 11, 2001, in response to an order to show cause, plaintiff admitted to acting in contempt of the order by continuing to display off-premises advertising.

Later that year plaintiff placed a sign on both sides of his billboard reading "AVAILABLE FOR ON SITE USE 650-366-2979." In February 2002 the trial court found plaintiff in contempt of the court's injunction and fined him $1000.00 plus attorneys fees.

Plaintiff still did not give up. Shortly after he was found in contempt he placed a sign on one side of his billboard reading as follows:

IN GOD WE TRUST

WE PRAY FOR WORLD PEACE

HELP STOP TERRORISM

The sign also lists telephone numbers for the San Mateo County Sheriff, the FBI and the Red Cross, and repeats the message for which he was previously found in contempt, namely, "AVAILABLE FOR ON SITE USE 650-366-2979." The other side of the billboard displays a message and telephone number for Peninsula Habitat for Humanity.

B. Procedural History

Before Caltrans took any action against plaintiff for the above signs, plaintiff filed this action broadly challenging the constitutionality of the Outdoor Advertising Act on

its face and as applied to him. Paragraph 11 of the complaint identifies those provisions of the Outdoor Advertising Act that plaintiff alleges are unconstitutional under the First and Fourteenth Amendments to the United States Constitution. Paragraph 11(a) identifies provisions requiring license and permit fees to engage in outdoor advertising. Paragraph 11(b) identifies provisions plaintiff claims are "offensive content-based prohibitions, restrictions, and penalties" on their face and as applied to plaintiff in the past. These "offending provisions" include: (1) the prohibition on outdoor advertising next to a landscaped freeway, California Business and Professions Code ("B&P Code") § 5440; (2) the prohibition on outdoor advertising along a scenic highway, B&P Code § 5440.1; (3) the provision providing for removal of signs in violation of B&P Code § 5440, B&P Code § 5441; (4) the exception to section 5440's prohibition for on-site advertising, B&P Code § 5442; (5) other exceptions to section 5440's prohibition, B&P Code § 5442.5; (6) the provision declaring violations of the advertising prohibitions a public nuisance, B&P Code § 5461; (7) the provision permitting revocation of a license or permit; B&P Code § 5463; (8) the provision making a violation of the Act a misdemeanor, B&P Code § 5464; and (9) a penalties provision, B&P Code § 5482.

Plaintiff seeks a permanent injunction prohibiting the Caltrans Director from enforcing the Outdoor Advertising Act, including those provisions that (1) require a permit and/or license fee; (2) prohibit outdoor advertising along a landscaped freeway; and (3) prohibit outdoor advertising along a scenic highway. He specifically requests that this Court enjoin Caltrans from enforcing the state court injunction. Complaint at p. 20 ("Said prohibition to include

any attempt by defendant to enforce any injunction based upon" the Outdoor Advertising Act). He claims the Act violates the First Amendment on its face and as applied to him.

Defendant originally moved to dismiss the complaint on the ground that it is barred by the one-year statute of limitations and judicial estoppel. He argued that plaintiff learned of his injury – not being able to conduct off-premises advertising – at the latest in March 2001, when the California Supreme Court denied review, more than one year (the applicable statute of limitations) before plaintiff filed this suit. He also argued that plaintiff is judicially estopped from challenging the constitutionality of the statute because plaintiff did not raise the issue in the state court proceedings. He contended that it would be unfair to allow plaintiff to relitigate matters that should have been raised in the state court.

Plaintiff responded that this action arises from a new injury; namely, the February 2002 contempt judgment and his fear that he will be found in contempt or fined for his new signs.

At oral argument the Court directed the parties to file supplemental memoranda on whether plaintiff's complaint is barred by res judicata as defendant's judicial estoppel argument was in essence a res judicata argument. Now before the Court are the parties' supplemental memoranda. Defendant now argues that the claims are barred by res judicata and the Rooker-Feldman doctrine.

DISCUSSION

A. Standing

Plaintiff's challenge to many of the allegedly offending statutory provisions must be dismissed because he does not have standing:

> The mere existence of a statute, which may or may not ever be applied to plaintiffs, is not sufficient to create a case or controversy within the meaning of Article III. A plaintiff must satisfy the injury-in-fact requirement by alleging that she "has suffered 'some threatened or actual injury resulting from the putatively illegal action.'" A plaintiff may allege a future injury in order to comply with this requirement, but only if he or she "is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury is both real and immediate, not conjectural or hypothetical."

Scott v. Pasadena Unified School Dist, 306 F.3d 646, 656 (9th Cir. 2002).

There is no case or controversy with respect to plaintiffs challenge to the permit/license requirements and the prohibition on advertising next to a scenic highway. Plaintiff owns a billboard next to *landscaped* freeway; he is absolutely prohibited from engaging in off-premise outdoor advertising at that location. Thus, the permit and license provisions do not apply to him. *See* Appellate Opinion at 8 ("So long as the portion of Highway 101 alongside appellant's property is designated 'landscaped freeway,' permits are irrelevant to any advertising thereon."). Accordingly, he does not have standing to challenge the permit and license fees and requirements.

For the same reason he does not have standing to challenge the outdoor advertising prohibition with respect to scenic highways.

Plaintiff does have standing to challenge the prohibition on off-site outdoor advertising along landscaped freeways. As is explained below, however, that challenge is barred by res judicata and the Rooker-Feldman doctrine.

B. Res judicata

The question presented is whether and to what extent the state court judgment barring plaintiff from engaging in outdoor advertising at his Redwood City location *in the future* bars his claim for an injunction prohibiting the Outdoor Advertising Act from being applied to him at this Redwood City location in the future. The preclusive effect of a state court judgment in federal court is based on state preclusion law. *See Howard v. America Online Inc.*, 208 F.3d 741, 748 (9th Cir. 2000); *see also Bybee v. A-Mark Precious Metals, Inc. (In re Bybee)*, 945 F.2d 309, 316 (9th Cir. 1991) ("[T]he res judicata effect of a previous state court judgment is determined by the law of the rendering court.").

"In California, a final judgment, 'even if erroneous,' acts as a bar to all other claims arising from the 'invasion of one primary right,' that is, to all other claims arising from the same injury." *Holder v. Holder*, 305 F.3d 854, 864 (9th Cir. 2002). "[T]he claim arises from the harm suffered, as opposed to the particular theory of the litigant. Even when multiple legal theories for recovery exist, one injury gives rise to only one claim for relief." *Eichman v. Fotomat Corp.*, 759 F.2d 1434, 1438 (9th Cir. 1985). "This bar applies whether or not the claim was actually adjudicated

in the prior proceeding,. . . . and, under California's compulsory cross-complaint rules, it applies to defendants as well as to plaintiffs." *Holder*, 305 F.3d at 864.

The filing of compulsory cross-complaints under California law is governed by Code of Civil Procedure section 426.30. It provides, with certain exceptions not relevant here, that "[i]f a party against whom a complaint has been filed and served fails to allege in a cross-complaint any related cause of action which (at the time of serving his answer to the complaint) he has against the plaintiff, such party may not thereafter in any other action assert against the plaintiff the related cause of action not pleaded." C.C.P. § 426.30(a). A related cause of action is a cause of action which arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause of action which the plaintiff alleges in his complaint." C.C.P. § 426.10; see also *Cheiker v. Prudential Ins. Co. of America,* 820 F.2d 334, 336-37 (9th Cir. 1987) (applying rule).

Plaintiff's constitutional challenge to the prohibition on off-premises outdoor advertising adjacent to landscaped freeways is barred by claim preclusion. The state court order enjoining plaintiff from engaging in such advertising is unquestionably a final judgment. Moreover, his claim that the statute violates the First Amendment on its face and as applied to him was a compulsory counterclaim to the nuisance action. His constitutional challenge is related to the nuisance action, that is, it arises out of the same series of transactions or occurrences, namely, plaintiff's attempts to engage in outdoor off-premises advertising at the Redwood City location.

Plaintiff responds that this action arises out of a different primary right, namely, the right to display his current advertisements and therefore is not barred. He argues that the Habitat For Humanity Sign is not off-site advertising. He also argues that Habitat For Humanity is a non-profit and that advertisements of non-profit activities are entitled to greater speech protection than advertisements for for-profit businesses. He contends that his other messages are religious and political and therefore cannot be barred under the statute. He also contends that he is not challenging any of the state court judgments. Finally, despite all of those disclaimers, he asserts that he is still challenging the application of the statute to commercial advertising.

The primary right adjudicated in the state court proceedings was the right to engage in off-site commercial advertising at 3600 Rolinson Road in Redwood City. Any claim in this case that plaintiff has a constitutional right to engage in such commercial off-site advertising is barred by its res judicata. Thus, to the extent plaintiff challenges as unconstitutional the statute's bar on outside off-premises advertising along a landscaped freeway, his claim must be dismissed. To hold otherwise would completely eviscerate the policy behind claim preclusion.

Plaintiff's claim that the statute is unconstitutional as applied to his current billboards because the billboards are not commercial advertisements is not barred by res judicata. Plaintiff could not have made such a claim in the earlier proceedings because such an issue was not presented; the state court proceedings were based on plaintiff's commercial advertisements.

C. Rooker-Feldman Doctrine.

Plaintiff's remaining claims, as well as his general challenge to the Outdoor Advertising Act, must nonetheless be dismissed under the Rooker-Feldman doctrine. The doctrine provides that federal courts, other than the United States Supreme Court, lack jurisdiction to adjudicate claims seeking review of state court judgments. *See Dubinka v. Judges of the Superior Court*, 23 F.3d 218, 221 (9th Cir. 1994). As the Ninth Circuit recently explained:

> The Rooker-Feldman doctrine recognizes that federal district courts generally lack subject matter jurisdiction to review state court judgments. The doctrine also precludes a federal district court from exercising jurisdiction over general constitutional challenges that are "inextricably intertwined" with claims asserted in state court. A claim is inextricably intertwined with a state court judgment if "the federal claim succeeds only to the extent that the state court wrongly decided the issues before it," or if "the relief requested in the federal action would effectively reverse the state court decision or void its ruling."

Fontana Empire Center, LLC v. City of Fontana, 307 F.3d 987, 992 (9th Cir. 2002).

Plaintiff's challenge to the constitutionality of the Outdoor Advertising Act's prohibition on billboard advertising along landscaped freeways is "inextricably intertwined" with the state court judgment. The state court issued a permanent injunction enjoining plaintiff from displaying billboard advertising at his Redwood City property that does not, among other things, advertise activities not conducted on plaintiff's premises. An order

from the Court declaring that the Outdoor Advertising Act cannot be enforced is an order that the state court injunction cannot be enforced against plaintiff; indeed, the complaint specifically seeks an order enjoining enforcement of the state court judgment. The Rooker-Feldman doctrine is thus an additional reason for dismissal of plaintiff's challenge to the Act's prohibition on off-site outdoor advertising along a landscaped freeway.

The doctrine also bars plaintiff's claim that the Act is unconstitutional as applied to plaintiff's current billboard advertisements.[1] Plaintiff's claim is premised on the assumption that Caltrans believes plaintiff's current advertisements violate the Outdoor Advertising Act. At oral argument, in response to a question from the Court regarding standing, plaintiff stated that the State had sent plaintiff a notice advising that his current advertisements violate the court injunction. If the state court finds plaintiff in contempt for his current signs, however, an order from this Court declaring that the Act as applied to these signs is unconstitutional and cannot be enforced would, in effect, reverse the state court's finding of contempt and thus be barred by the Rooker-Feldman doctrine. If, on the other hand, the state court finds that plaintiff's signs do not violate the Act and therefore do not violate the state court injunction, then the Act has not been

[1] At oral argument on November 15, 2002, plaintiff's counsel explained that the advertisements identified in the complaint are not currently being displayed; instead, plaintiff has put up political advertisements, including a sign advertising Bill Simon for California Governor. Counsel represented, however, that his client intends to immediately resume the advertisements identified in the complaint. Based on that representation, the Court concludes that plaintiff's as-applied challenge is not moot.

applied to plaintiff's current advertisements and there is no case or controversy. In other words, plaintiff's constitutional challenge with respect to his current billboard advertisements is not ripe.

In his supplemental memorandum plaintiff contends that his current signs do not violate the Act because they do not constitute commercial advertising. Such a claim, however, is not a claim that the statute as applied to him violates the United States Constitution; rather, it is simply a claim that his conduct does not violate state law. This Court declines to exercise supplemental jurisdiction of such a state law claim. The state court that issued the injunction is in the best position to determine if plaintiff's current signs violate the Act and the injunction.

CONCLUSION

In 1999 a California state court enjoined plaintiff from displaying billboard advertisements that violate California's Outdoor Advertising Act. A California Court of Appeal affirmed and the California Supreme Court denied review. The state court has twice found plaintiff in contempt of that order. Despite plaintiff's plea to the contrary, this action is nothing more than a belated attempt to reverse the state court's permanent injunction or, at best, to obtain a declaration from this Court that plaintiff's current signs do not violate the injunction. The Court cannot and, even if it could, will not exercise its jurisdiction over either of these claims. Accordingly, plaintiff's complaint is dismissed without prejudice.

IT IS SO ORDERED.

Dated: November 27, 2002

/s/
CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NANO MALDONADO, Plaintiff-Appellant, v. JEFF MORALES, in his capacity as Director of the California Department of Transportation, Defendant-Appellee.	No. 03-15007 D.C. No. CV-02-03167-CRB Northern District of California, San Francisco ORDER (Filed Aug. 27, 2004)

Before: B. FLETCHER, REINHARDT, Circuit Judges, and RESTANI, Chief IT Judge.

The panel has voted to deny the petition for panel rehearing. Judge Reinhardt votes to deny the petition for rehearing en banc and Judges B. Fletcher and Restani so recommend.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO

PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the DEPARTMENT OF TRANSPORTATION, Plaintiff, v. NANO MALDONADO, Defendant.	No. 405466 **COMPLAINT TO ABATE PUBLIC NUISANCE** [Bus. & Prof. Code Section 5461] (Filed Jul. 9, 1998)

COMES NOW plaintiff PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the DEPARTMENT OF TRANSPORTATION, and for a complaint to abate public nuisance alleges:

1. Plaintiff is and at all times material hereto was the agency duly authorized by law to administer and

enforce the provisions of the Outdoor Advertising Act, Business and Professions Code sections 5200 et seq.

2. Defendant Nano Maldonado is and was at all times material hereto the owner of an outdoor billboard display located adjacent to Highway 101, at postmile 3.95, approximately 0.33 miles north of Marsh Road, in San Mateo County, California.

3. Business and Professions Code section 5350 provides that no person shall place any advertising display within areas subject to the Outdoor Advertising Act without first having obtained a written permit from plaintiff.

4. Business and Professions Code section 5440 provides that, with exceptions not material hereto, no advertising display shall be placed or maintained on property adjacent to a section of a freeway which has been landscaped, if the advertising display is designed to be viewed primarily by persons traveling on the main-traveled way of the landscaped freeway.

5. Under authority of said Business and Professions Code sections 5350 and 5440 plaintiff notified defendant, on or about October 14, 1993 and October 16, 1996, that the subject display was unlawfully erected and maintained, in that it was maintained without a permit, and was placed on property adjacent to a landscaped freeway, to be viewed primarily by motorists traveling on the main-traveled way of Highway 101.

6. On or about July 16, 1997 an administrative hearing was held before the Caltrans Outdoor Advertising Review Board, at which time defendant appeared with

legal counsel and argued that the subject display was lawful.

7. On or about July 16, 1997 the Caltrans Outdoor Advertising Review Board rejected defendant's arguments and determined the subject display was unlawful as having been maintained without a permit and placed adjacent to a landscaped segment of Highway 101.

8. Notwithstanding notice from plaintiff to remove said billboard display, defendant has failed and refused, and continues to fail and refuse to do so, and maintains the display in violation of Business and Professions Code section 5461, making said billboard a public nuisance.

WHEREFORE, plaintiff prays for:

1. A judgment declaring that the subject outdoor advertising billboard is unlawfully placed and maintained, in violation of sections 5350 and 5440 of the Business and Professions Code;

2. A judgment declaring that the subject outdoor advertising billboard is a public nuisance within the meaning of Business and Professions Code section 5461;

3. An order compelling defendant to remove and destroy the subject outdoor advertising billboard by a date certain;

4. A judgment declaring that should defendant fail to remove and destroy said billboard by a date certain, that plaintiff may exercise self-help to remove and destroy said billboard, and that defendant shall cooperate by allowing defendant or its agents onto plaintiff's premises for said purpose, and that defendant shall reimburse plaintiff its

reasonable costs attendant to said billboard removal and destruction;

5. A permanent injunction restraining defendant from placing or maintaining any outdoor advertising billboard display in violation of the Outdoor Advertising Act;

6. Costs of suit herein; and

7. Such further relief as may be granted by the court.

Dated: 6/23/98

MURPHY, SHEIN, WONG, SANDLER

By /s/ David N. Sandler
DAVID N. SANDLER, ESQ.
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PEOPLE OF THE STATE OF CALIFORNIA

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Attorney for Defendant
AURELIANO (Nano) MALDONADO

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN MATEO

PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the DEPARTMENT OF TRANSPORTATION, Plaintiff, v NANO MALDONADO, Defendant.	No. 405466 ANSWER OF NANO MALDONADO (Filed Sep. 22, 1998)

COMES NOW THE DEFENDANT NANO MALDONADO, who admits, denies and alleges as follows:

I.

Answering defendant admits the allegations contained in paragraphs 1, 2, and 3.

II.

Answering defendant denies the allegations of paragraph 4 and alleges that the exceptions to Business and Professions Code, section 5440 to wit 5442 (b) and (c) are true, applicable and that defendant complied therewith and was entitled to the benefits and protection thereof.

III

Admits that citations dated October 14, 1993 and later October 16, 1996 were issued to defendant as owner and occupier of the subject property upon which the sign is located. Defendant denies the balance and remaining allegations of paragraph 5.

Further, the statute of limitations for nuisance began upon the first stated date and this action is therefore barred by the statute of limitations.

IV

Answering defendant is seeking the administrative record in the alleged hearing contained in paragraph 6. It is defendant's belief that if the hearing is deemed to be an adjudicative hearing that absolutely no evidence was proferred or introduced that could have the weight or effect to deny or prove that Defendant was not at all times in compliance with exceptions to the statute contained in section 5442 (b) and (c) of the Business and Professions code.

V

It is answering defendant's intention to seek and exhaust all available administrative remedies including a petition for Administrative Mandamus, pursuant to section 1094.5 of the Code of Civil Procedure so that an action for inverse condemnation and damages for complete loss of all right and utility in the aforementioned sign can procedurally commence.

It is believed that the decision is not ripe nor final at the alleged administrative hearing. This action is premature.

Therefore, defendant denies the allegations of paragraphs 6 and 7. Defendant further denies that the sign, its structure and attachments are any nuisance. That the sign was lawfully erected in the year 1954. That is the sign is to be removed under any legal, administrative or other means that the owner thereof, defendant herein, is entitled to compensation as provided for in section 5412 of the Business and Profession Code.

AFFIRMATIVE DEFENSES

I.

The complaint and each cause of action contained therein is insufficient in that it fails to state any cause of action.

II

The complaint alleges facts seeking to abate a nuisance. This cause of action is barred by the statute of limitations section 338 of the Civil Code of Procedure and

the authority of Civil Code, section 3479, 3480 et seq, and *Mangini v Aerojet-General Corp*, 1991 230 Cal.App.3d. 1125, 281 Cal. Rep. 827.

III

Plaintiff is estopped to allege nuisance or any other action to remove and eliminate the sign in that defendant complied with the letter from Plaintiff advising that no permit was needed for on premises advertising.

IV

Plaintiff is barred by laches from enforcing the removal of this sign which was originally and lawfully erected in 1954. If plaintiff seeks the removal of this sign then plaintiff is required to pay compensation under the provisions of the Outdoor Advertising Act, section 5412 and the procedures and processes contained in Code of Civil Procedure, sections 1250.010 et seq.

-V-

Plaintiff has failed to mitigate defendant's damage.

WHEREFORE, Defendant NANO MALDONADO prays Judgment as follows:

1. That plaintiff take nothing by way of his complaint.

2. That the action is premature in that there is no final decision in any administrative proceeding. That Defendant be allowed to exhaust all available administrative remedies before the issues and trial are finally joined in this action.

3. That compensation be awarded to defendant in the event that the property rights in the sign are taken by this or other action by the Plaintiff.

4. The plaintiff follow the terms and provisions of Business and Professions Code, section 5412, in determining and paying defendant for all beneficial losses in the use of his sign.

5. The the [sic] action be dismissed and barred by the statute of Limitations.

6. That the Plaintiff be barred by laches in prosecuting this action or any future action.

7. That the plaintiff be estopped in this and any future action from seeking to take and remove any and all beneficial property interest in the defendant to the sign alleged in the complaint.

8. Such other just and meet relief as the court may find.

9. Defendant prays leave to amend this complaint when he has exhausted all administrative remedies, including a petitioner for Administrative Mandamus, after receiving the administrative record so as to state a cause of action and cross complaint for inverse condemnation of all property interests in the subject sign owned by defendant NANO MALDONADO.

DATED: September 22, 1998. /s/ Dan Clapp
DAN CLAPP, Attorney.

VERIFICATION OF ATTORNEY.

I, Dan Clapp, undersigned, declare the following under penalty of perjury. That I represent defendant

NANO MALDONADO. That I verify this answer on his behalf because he is absent from the county in which I have my law offices – I am informed and believe that the answers and allegations are true.

Dated: September 22,1998, at Redwood City, California.

/s/ Dan Clapp
Dan Clapp, Attorney

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

NANO MALDONADO, Plaintiff, v. JEFF MORALES in his capacity as Director of the California Department of Transportation, Defendant.	) Case Filed:) Case Number: C 02 3167) Trial Date: Not Assigned)) **COMPLAINT FOR EQUITABLE RELIEF**)) (Filed Jul. 2, 2002)

Plaintiff Nano Maldonado (hereinafter "plaintiff") hereby alleges:

I.

JURISDICTION

1. This court has subject-matter jurisdiction because the action arises from a Federal question under the First Amendment to the United States Constitution as made applicable to the State of California under the Fourteenth Amendment to the United States Constitution pursuant to

the authority of *Gitlow v. New York* (1925) 268 U.S. 652. The enabling legislation upon which this action is based is an Act of Congress codified at 42 United States Code section 1983, a law enacted by Congress pursuant to its power under section 5 of the Fourteenth Amendment to the United States Constitution. Venue is proper because the acts complained of occurred in Redwood City, California.

II.

FIRST CAUSE OF ACTION

(42 U.S.C. § 1983 – Deprivation of Civil Rights Under 1st & 14th Amendments)

2. Plaintiff is, and at all times mentioned herein was, a citizen of the United States of America who owns real property improved with a warehouse and offices commonly known as 3600 Rolison Road in Redwood City, California. The property is adjacent to the southbound lanes of Highway 101 in Redwood City. In 1956, a double-sided billboard was mounted on the roof of the building and during the 1960's and 1970's the billboard was used for off-premises advertising, i.e., goods and services not located in the 3600 Rolison Road Building. Mr. Maldonado purchased the building in the early 1990's. Highway 101 is now officially designated as a "landscaped freeway."

3. Defendant Jeff Morales is a person who, under color of a statute of the State of California, and within the scope of his duties as Director of the California Department of Transportation, has and continues to deprive plaintiff of his civil rights guaranteed by the 1st Amendment to the United States Constitution as made applicable to the State of California under the Fourteenth Amendment to the

United States Constitution pursuant to the authority of *Gitlow v. New York* (1925) 268 U.S. 652.

4. Defendant Jeff Morales has enforced provisions of the Outdoor Advertising Act against plaintiff and is mandated by law to continue to enforce the Outdoor Advertising Act against plaintiff. Past enforcement has, and future enforcement will, abridge and deprive plaintiff of his freedom of speech and of the press. As more specifically alleged below, provisions of the Outdoor Advertising Act are unconstitutional on their face, and as applied to plaintiff in this particular case. The specter of future enforcement actions under these provisions of the Outdoor Advertising Act chills plaintiff's freedom of speech and the press and place the liberty and pecuniary interests of plaintiff in imminent peril.

5. The need for the Outdoor Advertising Act, as declared by the Legislature at Business & Professions Code section 5226, is as follows: "The regulation of advertising displays adjacent to any interstate highway or primary highway as provided in Section 5405 is hereby declared to be necessary to promote the public safety, health, welfare, convenience and enjoyment of public travel, to protect the public investment in such highways, to preserve the scenic beauty of lands bordering on such highways, and to insure that information in the specific interest of the traveling public is presented safely and effectively, recognizing that a reasonable freedom to advertise is necessary to attain such objectives. The Legislature finds: (a) Outdoor advertising is a legitimate commercial use of property adjacent to roads and highways. (b) Outdoor advertising is an integral part of the business and marketing function, and an established segment of the national economy, and should be allowed to

exist in business areas, subject to reasonable controls in the public interest."

6. The Outdoor Advertising Act, at Business & Professions Code section 5300 states, "A persons engages in the business of outdoor advertising whenever, personally or through employees, that person places an advertising display, changes the advertising message of an advertising display that does not pertain exclusively to that person's business and is visible to a state highway or freeway. (b) A manufacturer or distributor of a product for sale to the general public does not engage in the business of outdoor advertising when furnishing a sign pertaining to the product to a retailer of that product for installation on the retailer's place of business or when installing on the retailer's place of business a sign containing advertising pertaining to the product, the name of or the business of the retailer.

7. The Outdoor Advertising Act, at Business & Professions Code section 5202, states "'Advertising display' refers to advertising structures and to signs."

8. The Outdoor Advertising Act, at Business & Professions Code section 5203, states "'Advertising structure" means a structure of any kind or character erected, used, or maintained for outdoor advertising purposes, upon which any poster, bill, printing, painting or other advertisement of any kind whatsoever may be placed, including statuary, for advertising purposes. 'Advertising structure' does not include: (a) Official notices issued by an [sic] court or public body or officer; (b) Notices posted by any public officer in performance of a public duty or by any person in giving legal notice; (c) Directional, warning or information structures required by or authorized by law or

by federal, state or county authority. (d) A structure erected near a city or county boundary, which contains the name of such city or county and the names of, or any information regarding, civic, fraternal or religious organizations therein."

9. The Outdoor Advertising Act, at Business & Professions Code section 5221, states, "'Sign' refers to any card, cloth, paper, metal, painted or wooden sign of any character placed for outdoor advertising purposes on or to the ground or any tree, wall, bush, rock, fence, building, structure or thing, either privately or publicly owned, other than an advertising structure. 'Sign' does not include any of the following: (a) Official notices issued by any court or public body or officer. (b) Notices posted by an [sic] public officer in performance of a public duty or by any person in giving any legal notice. (c) Directional warning or information signs or structures required by or authorized by law or by federal, state or county authority. (d) A sign erected near a city or county boundary that contains the name of that city or county and the names of, or any other information regarding, civic, fraternal, or religious organizations located within that city or county."

10. The Outdoor Advertising Act, at Business & Professions Code section 5216 states, "'Landscaped freeway' means a section or sections of a freeway which is now, or hereafter may be, improved by the planting at least on one side of freeway right-of-way of lawns, trees, shrubs, flowers or other ornamental vegetation which shall require reasonable maintenance. Planting for the purpose of soil erosion control, traffic safety requirements, reduction of fire hazards, or traffic noise abatement, shall not change the character of a freeway to a landscaped freeway."

11. The offending provisions of the Outdoor Advertising Act are as follows:

a. Offensive Licensing and Permit Provisions

On their face, and as applied to plaintiff, the following licensing and permit provisions subject speakers and publishers such as plaintiff to unlawful prior restraint by the government and otherwise abridge the freedom of speech, and of the press, by requiring official speaking and publication fees, and by preventing anonymous distribution of ideas by way of the medium of billboards.

i. Business & Professions Code § 5301: "No person shall engage in or carry on the business or occupation of outdoor advertising without first having paid the license fee provided by this chapter. The fee is payable annually in advance on the first day of July of each year to the director or his authorized agent. Each license shall remain in force for the term of one year from and after the first day of July, and may be renewed annually. A license shall be obtained whether or not the advertising display requires a permit."

ii. Business & Professions Code § 5303: "Every application for a license shall be made on a form to be furnished by the director. It shall state the full name of the applicant and the post office address of his fixed place of business and shall contain a certification that the applicant has obtained a copy of the provisions of this chapter and any regulations adopted thereunder and is aware of their contents. The issuance of a license entitles the holder to engage in or carry on the outdoor advertising business and to apply for permits during the term of the license.

iii. Business & Professions Code § 5484: "(a) The license fee is two hundred fifty dollars ($250) for an original license and for each annual renewal thereof for any applicant maintaining six or less sign or structure permits, or both, except where the applicant has engaged in the business of outdoor advertising without a valid, unrevoked and unexpired license, the fee for any issuance of the first license thereafter is three hundred fifty dollars ($350, one hundred dollars ($100) of which is the penalty. (b) The license fee is five hundred dollars ($500) for an original license and for each annual renewal any applicant maintaining seven or more sign or structure permits, or both, except where the applicant has engaged in the business of outdoor advertising without a valid, unrevoked and unexpired license the fee for any issuance of the first license thereafter is six hundred dollars ($600), one hundred dollars ($100) of which is the penalty.

iv. Business & Professions Code § 5350: "No person shall place any advertising display within the areas affected by the provisions of this chapter in this state without first having secured a written permit from the director or from his authorized agent."

v. Business & Professions Code § 5355: "An application for a permit to place a display shall contain a description of the display, including its material, size, and subject and the proposed manner of placing it."

vi. Business & Professions Code § 5485: "(a) The permit for each advertising sign is twenty dollars ($20) for an original permit and for each year the permit is operative, except where the applicant has placed or maintained the sign without a valid, unrevoked, and unexpired permit therefor, the fee for any issuance of the first permit thereafter is

ninety-five dollars ($95), seventy-five dollars ($75) of which is the penalty. (b) The permit fee for an advertising structure for the original permit and for each year the permit is operative is twenty dollars ($20), except where the applicant has placed or maintained the structure without a valid, unrevoked, and unexpired permit therefor, the fee for any issuance of the first permit thereafter is ninety-five dollars ($95), seventy-five dollars ($75) of which is the penalty."

vii. Business & Professions Code § 5400: "No advertising structure may be maintained unless the name of the person owning or maintaining it, is plainly displayed thereon."

b. Offensive Content-Based Prohibitions, Restrictions, and Penalties

On their face, the following prohibitions, restrictions, and penalties abridge the freedom of speech, and of the press, of individuals such as plaintiff because they are content based, irrational and too restrictive, arbitrary and capricious, and foreclose the medium of billboard advertising. They also arbitrarily deny certain private billboard owners equal protection of the laws.

Furthermore, as applied against plaintiff, the prohibitions, restrictions, and penalties identified below prohibit and punish plaintiff from advertising that the property upon which the sign is located is available for lease because the California Superior Court in and for the County of San Mateo has ruled that plaintiff may not display the message, "AVAILABLE FOR ON SITE USE 650-366-2979" or "(650) 366-2979 AVAILABLE FOR ON SITE USE" on his billboard.

Moreover, as applied against plaintiff, the prohibitions, restrictions, and penalties identified below do *not* in this case promote the public safety, health, welfare, convenience and enjoyment of public travel, to protect the public investment in such highways, to preserve the scenic beauty of lands bordering on such highways, and to insure that information in the specific interest of the traveling public is presented safely and effectively because the sign is so high and out of the way that it does not interfere with any official signs and/or present a danger to traffic and it does not interfere with the scenic beauty of lands bordering the highway because it is located above and beyond a large sound wall that completely obstructs the view of lands bordering the highway.

Also, as applied against plaintiff, the prohibitions, restrictions, and penalties identified below are irrational, too restrictive, and arbitrary and capricious because licenses and permits for private advertising signs that are physically similar to plaintiff's sign have been issued and/or advertising signs have been deemed exempted from the law within a segment of the highway that is in close proximity to the property of plaintiff. The allowance of such signs in this case undermines and invalidates the purported necessity of the law; i.e. to promote the public safety, health, welfare, convenience and enjoyment of public travel, to protect the public investment in such highways, to preserve the scenic beauty of lands bordering on such highways, and to insure that information in the specific interest of the traveling public is presented safely and effectively. If restricting or banning signs similar to that of plaintiff were *truly* necessary to achieve the goals, ALL private signs with similar physical characteristics would be treated similarly under the law. The fact that in

this case plaintiff is subject to penalties, but other nearby private owners of similar signs are not, indicates that the laws are being applied unfairly against plaintiff.

Finally, the prohibitions, restrictions, and penalties identified below are being applied in such a way as to deny plaintiff equal protection of the laws; due to selective enforcement of the law plaintiff has been punished under the Outdoor Advertising Act whereas the private owners of other nearby signs of similar physical appearance have not.

i. Business & Professions Code § 5440: "Except as provided in Sections 5441, 5442, 5442.7, 5442.8, 5442.9, 5442.10, and 5442.11, no advertising display may be placed or maintained on property adjacent to a section of a freeway that has been landscaped if the advertising display is designed to be viewed primarily by persons traveling on the main-traveled way of the landscaped freeway."

ii. Business & Professions Code § 5440.1: "Except as provided in Section 5442.5, no advertising display may be placed or maintained along a highway or segment of any interstate highway or primary highway that before, on, or after the effective date of Section 131(s) of Title 23 of the United States Code is an officially designated scenic highway or scenic byway."

iii. Business & Professions Code § 5441: "Any advertising display which is now, or hereafter becomes, in violation of Section 5440 shall be subject to removal three years from the date the freeway has been declared a landscaped freeway by the director or the director's designee and the character of the freeway has been changed from a freeway to a landscaped freeway."

iv. Business & Professions Code § 5442: "Section 5440 does not apply to any advertising structure or sign if the advertising display is used exclusively for any of the following purposes: (a) To advertise the sale or lease of the property upon which the advertising display is placed. (b) To designate the name of the owner or occupant of the premises upon which the advertising display is placed, or to identify the premises. (c) To advertise goods manufactured or produced, or services rendered, on the property upon which the advertising display is placed."

v. Business & Professions Code § 5442.5: "Section 5440.1 does not apply to any advertising display if the advertising display is used exclusively for any of the following purposes: (a) Directional and official signs and notices, including, but not be limited to, signs and notices pertaining to natural wonders or scenic and historical attractions that are otherwise required authorized by law and conform to regulations adopted by the department. (b) Signs, displays, and devices advertising the sale or lease of real property upon which they are located. (c) Signs, displays, and devices, including, but not limited to, those that may be changed at reasonable intervals by electronic process or by remote control, advertising activities conducted on the property which they are located. (d) Signs lawfully in existence on October 22, 1965, as determined by the department to be landmark signs, including signs on farm structures or natural surfaces, or of historic or artistic significance the preservation of which, in the opinion of the department, would be consistent with the purposes of this section, as determined by regulations adopted by the department. (e) Signs, displays, and devices advertising the distribution by nonprofit organizations of free coffee to individuals traveling on the interstate

system or the primary system. For the purpose of this subdivision, the term "free coffee" means, coffee for which a donation may be made, but is not required."

vi. Business & Professions Code § 5461: "All advertising displays which are placed or which exist in violation of the provisions of this chapter are public nuisances and may be removed by any public employee as further provided in this chapter."

vii. Business & Professions Code § 5463: "The director may revoke any license or permit for the failure to comply with this chapter and may remove and destroy any advertising display placed or maintained in violation of this chapter after 30 days' written notice posted on the structure or sign and a copy forwarded by mail to the display owner at his or her last known address. Notwithstanding any other provision of this chapter, the director or any authorized employee may summarily and without notice remove and destroy any advertising display placed in violation of this chapter which is temporary in nature because of the materials of which it is constructed or because of the nature of the copy thereon. For the purpose of removing or destroying any advertising display placed in violation of this chapter, the director or the director's authorized agent may enter upon private property."

viii. Business & Professions Code § 5464: "Every person as principal, agent or employee, violating any of the provisions of this chapter is guilty of a misdemeanor."

ix. Business & Professions Code § 5482: "Any display owner who does not remove an advertising display that is placed or maintained in violation fo [sic] this chapter and is removed and destroyed by the director or any authorized employee pursuant to Section 5463, shall

pay to the director a fine in an amount equivalent to any costs related to that removal and destruction."

12. In March 1993, plaintiff applied to the California Department of Transportation for a permit to use the billboard for an off-premise display and in April of 1993 the permit was denied because the proposed advertisement would be along a segment of Highway 101 classified as "landscaped freeway" under the Outdoor Advertising Act. Plaintiff was informed that certain "on-premises" advertising was permissible, but when plaintiff leased the premises to tenants who attempted to advertise as "on-premises" occupants, plaintiff was sued and enjoined from permitting such conduct.

13. In the action initiated in the name of the People of California by defendant Jeff Morales, in his capacity as Director of the California Department of Transportation, an injunction based on the specified unconstitutional provisions of the Outdoor Advertising Act identified above was issued against plaintiff by the Superior Court in and for the County of San Mateo. A true and correct copy of said injunction is attached hereto as exhibit "A" and incorporated herein.

14. Said injunction was modified to strike paragraph 4a pursuant to the published decision of the California Court of Appeal in *People ex rel. Department of Transportation v. Maldonado* (2001) 86 Cal.App.4th 1225 (review denied). A true and correct copy of said case is attached hereto as exhibit "B" and incorporated herein.

15. In an action initiated in the name of the People of California by defendant Jeff Morales, in his capacity as Director of the California Department of Transportation, plaintiff was found in contempt of court, fined $1,000, and

compelled to pay $1,185 in attorneys' fees for violating said injunction by displaying the message, "AVAILABLE FOR ON-SITE USE 650-366-2979" on one side of his sign and the message, "(650) 366-2979 AVAILABLE FOR ON-SITE USE" on the other side of his sign. A true and correct copy of said order is attached hereto as exhibit "C" and incorporated herein.

16. Plaintiff now displays the following message on one side of his billboard:

IN GOD WE TRUST

WE PRAY FOR WORLD PEACE

HELP STOP TERRORISM

SAN MATEO 1(800) HELP NOW F.B.I.

COUNTY SHERIFF 1(800) RED CROSS 1(866) 483-5137

1(800) 547-2700

AVAILABLE FOR ON SITE USE 650-366-2979

The sign also contains a drawings of white "peace" doves next to a drawing of the Earth.

17. Plaintiff now displays the following message on the other side of his billboard:

With your help we're

Building Community on the Peninsula.

650-324-2264

Peninsula Habitat for Humanity

Your Local Habitat Affiliate

The sign also contains a picture of two construction workers and the official logo of Peninsula Habitat for Humanity.

18. Plaintiff lives in constant fear that defendant Jeff Morales, in his capacity as Director of the California Department of Transportation, will cause further legal action to be taken against plaintiff pursuant to the unconstitutional laws identified above and that plaintiff will be further fined or perhaps imprisoned for exercising his constitutional right of free speech, and of the press.

19. Plaintiff has exhausted any and all administrative procedures and based upon the above-stated history, plaintiff believes that any future efforts, even to reapply for advertising licenses and permits for outdoor advertising at 3600 Rolison Road would be futile and constitute an idle act.

20. Plaintiff has no plain, speedy, or adequate remedy at law.

WHEREFORE, plaintiff prays for judgment in his favor and against defendant Jeff Morales, in his capacity as Director of the California Department of Transportation, as follows:

1. A permanent injunction prohibiting the Director of the California Department of Transportation, from any prospective attempt to enforce, either personally or by authorization of another, Business & Professions Code sections 5301, 5303, 5484, 5350, 5355, 5484, 5400, 5440, 5440.1, 5441, 5442, 5442.5, 5461, 5463, 5464, and 5482 against any citizen of the United States in general, and against plaintiff Nano Maldonado in particular. Said prohibition to include any attempt by defendant to enforce

any injunction based upon said Business and Profession Code sections.

2. Costs of suit and attorneys' fees pursuant to 42 United States Code section 1988, a law enacted by Congress pursuant to its power under section 5 of the Fourteenth Amendment to the United States Constitution.

FOGARTY & WATSON, LLP

Dated: June 28, 2002 By: /s/ Dennis Zell
Dennis Scott Zell, Esq.
Attorney for Plaintiff
Nano Maldonado

(2)

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No. 04-746

In The

Supreme Court of the United States

TONY HARRIS, IN HIS CAPACITY AS ACTING DIRECTOR OF THE CALIFORNIA DEPARTMENT OF TRANSPORTATION,

Petitioner,

v.

NANO MALDONADO, AN INDIVIDUAL,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. INTRODUCTION

The Acting Director of the California Department of Transportation seeks discretionary review of the published opinion of a *unanimous* three judge panel of the Ninth Circuit in *Maldonado v. Harris*, 370 F.3d 945 (CA9 2004). The impressive panel consisted of the Honorable Betty Fletcher, Honorable Stephen Reinhardt, and Honorable Jane A. Restani, Chief Judge of the United States Court of International Trade, sitting by designation. The panel *unanimously* denied a petition for panel rehearing and *unanimously* recommended against a rehearing en banc. When advised of the petition for en banc rehearing, *none* of the judges of the full Ninth Circuit even requested a vote. The combined petition for panel and en banc rehearing was denied on August 27, 2004. (See Petitioner's Appendix [P.A.] at 52.)

The Acting Director seeks review of the Ninth Circuit's application of one state, and two federal matters: 1) California's issue preclusion doctrine, 2) the federal rule of accrual for statutes of limitations barring federal actions brought under 42 U.S.C. § 1983, and 3) the jurisdictional *Rooker-Feldman* doctrine.

"Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." (Rule 10, U.S. Supreme Court Rules of Court.) As will be discussed below, there are no compelling reasons to grant certiorari in this case.

II. ARGUMENT

A. THERE IS NO COMPELLING REASON TO REVIEW THE NINTH CIRCUIT'S APPLICATION OF CALIFORNIA'S ISSUE PRECLUSION DOCTRINE

1. Petitioner Misstates The California Rule

The Acting Director contends that the California rule for analyzing issue preclusion was stated in *Sutphin v. Speik*, 15 Cal.2d 195 [99 P.2d 652 & 101 P.2d 497] (1940). (See P.B. at p. 15 quoting *Sutphin* at 202.)

However, the Acting Director fails to point out that the *Sutphin* court expressly cautioned in its attached opinion denying rehearing *that its holding should be restricted to the facts of the case*:

> Defendant in his petition for rehearing challenges certain portions of our opinion, which he interprets as meaning that in a second suit on a different cause of action, any issue which could have been raised in the first suit is res judicata in the second, even though not actually determined in the first. *This is not our holding, and the opinion must be read in connection with the facts of this case, and with an understanding of the issue which was, in fact, decided in the former action.*

(*Sutphin* (*supra*) at p. 14 [101 P.2d 497] (*emphasis* added).)

In *Sutphin* the issue which "was, in fact, decided in the former action" was *the division of royalties from specific oil wells under a specific contract.* The losing defendant in the first case was precluded from re-litigating *the division of royalties from the same specific oil wells under the same specific contract* in a second case based

upon evidence which existed, but was not presented, in the first case.

Here, no one is attempting to re-litigate the division of royalties from specific oil wells under a specific contract and thus the Ninth Circuit decision does not conflict with *Sutphin*.

2. The Correct California Rule For Issue Preclusion Requires Issues To Be Actually Litigated

It is basic California hornbook law that there can only be issue preclusion "as to such issues in the second action as were *actually litigated and determined in the first action.*" (*Todhunter v. Smith*, 219 Cal. 690, 695 [28 P.2d 916] (1934) [*emphasis* added].)

Indeed, after *Sutphin* was decided the California Supreme Court reaffirmed that the "aspect of the doctrine of collateral estoppel, is confined to issues *actually litigated.*" (*Clark v. Lehsher*, 46 Cal.2d 874, 880 [299 P.2d 865] (1956) [*emphasis* added] citing *Sutphin v. Speik* (*supra*).) The California Supreme Court reaffirmed the rule even though it admitted that "[i]t is not an easy rule to apply, for the term 'issue' as used in this connection is difficult to define, and the pleadings and proof in each case must be carefully scrutinized to determine whether a particular issue was raised even though some legal theory, argument or 'matter' relating to the issue was not expressly mentioned or asserted." (*Ibid.*)

In close cases, it should be remembered that the burden of proof of establishing the defense of issue preclusion is on the defendant. (*McMillian Dev. v. Home Buyers*

Warranty, 68 Cal.App.4th 896, 906 [80 Cal.Rptr.2d 611] (1998) [defendant failed to meet burden]; *Emerson v. Yosemite Gold Mining & Milling Co.*, 149 Cal. 50, 57 [85 P. 122] (1906) ["Where it is sought to show that a certain question in issue has been litigated and determined between the same parties in a previous action, it is not enough that the proposed evidence tends to show that the precise question *may* have been involved in such litigation. It must clearly appear that it was directly involved and adjudicated."] (*emphasis* added) citing *Beronia v. Ventura County Lumber Co.*, 129 Cal. 232-236 [61 Pac. 958] (1900).)

3. Here It Is Undisputed That The Constitutional Issues Were Not Litigated

The Ninth Circuit's opinion in this case expressly states, "At no time did Maldonado raise federal constitutional claims during [the state court] litigation." (See P.A. at pp. 3-4.) Indeed, at one point the Acting Director even admitted that "the District Court's dismissal was based on claim preclusion, *not* issue preclusion. . . . " (Appellee's Opposition Brief to the Ninth Circuit at p. 12. [*emphasis* in original].)

With respect to the trial court, the only issues that were actually litigated by the San Mateo County Superior Court were whether the content of the advertisements posted on Mr. Maldonado's billboard for the Stanford Shopping Center, the Palo Alto Holiday Inn, Skyway Cellular, Golden Time Jewelers, and Stanford University constituted the statutory nuisance known as "off-site advertising" because 1) the advertisers did not have sufficient contacts with the billboard location to be deemed

"on-site advertisers", and 2) the messages displayed on the billboard directed people to goods and services at other locations. (See P.A., pp. 52-56 [*Complaint to Abate Public Nuisance*]; pp. 57-62 [*Answer of Nano Maldonado*]; and pp. 20-23 [*Judgment Granting Injunctive Relief*].)

With respect to the appellate court, the only issues actually litigated were whether 1) the Superior Court had properly construed the California statutes applicable to outdoor advertising, 2) the injunction imposed by the trial court was "sufficiently definite" and "comport[ed]" with the statutes applicable to outdoor advertising, and 3) the trial court acted within its discretion by denying Mr. Maldonado leave to file a claim for inverse condemnation. (See P.A., pp. 24-37 [Published opinion of California Court of Appeal in *People ex rel Department of Transportation v. Maldonado*, 86 Cal.App.4th 1225 [104 Cal.Rptr.2d 66] (2001)].)

Furthermore, to the extent that the Acting Director argues that the correct rule was somehow misapplied, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." (Rule 10, U.S. Supreme Court Rules of Court.)

In any event, conceptually it is difficult to comprehend how Mr. Maldonado could possibly have made an "as applied" challenge in the state court proceeding to billboard messages that were not even conceived of or displayed until *after* the proceeding was completed.

4. The Cases Cited By Petitioner All Involved Issues That Were Actually Litigated

The Acting Director contends that three appellate cases bolster its *Sutphin* arguments (discussed above). As a threshold matter it should be pointed out that lower court decisions in conflict with the California Supreme Court on a matter of state law do not pose a compelling reason for *this* court to intervene – especially where the decision sought to be reviewed relied on a correct statement of the law *as articulated by the state's highest court*. In any event, the cases are distinguishable.

The first case cited is *Takahashi v. Board of Education*, 202 Cal.App.3d 1464 [249 Cal.Rptr. 578] (1988) (cert. denied, 490 U.S. 1011 (1989)). The *Takahashi* case was primarily decided on *claim preclusion* grounds. (See *id.* at 1474-1477 commencing at Heading A ["The Primary Right involved here is the same as in the first action."].) However, the *Takahashi* court also made an alternate holding on issue preclusion grounds and quoted generously from *Sutphin*. But with respect to issue preclusion, the *Takahashi* court merely concluded that *the issue of professional incompetency* (a defense to the § 1983 action) was *actually litigated* in the administrative hearing.

The next case cited by the Acting Director, *Amin v. Khazindar*, 112 Cal.App.4th 582 [5 Cal.Rptr.3d 224] (2003) concerned ownership of real estate. The *Amin* court simply held that the losing defendant in the first action, who had failed to present any evidence of an alleged homestead in that first action, was precluded from re-litigating *the ownership issue* by presenting evidence of the alleged homestead in the second action.

The final case cited by the Acting Director is *Miller v. County of Santa Cruz*, 39 F.3d 1030 (CA9 1994). Like *Takahashi* (*supra*), this case was decided primarily on *claim preclusion* grounds but included an alternate holding on *issue preclusion* grounds. Although the *Miller* court cited to *Takahashi* it relied most heavily upon *Swartzendruber v. City of San Diego*, 3 Cal.App.4th 896 [5 Cal.Rptr.2d 64] (1992) (disapproved in *Johnson v. City of Loma Linda*, 24 Cal.4th 61, 72 [99 Cal.Rptr.2d 316] (2000) ["we now disapprove that decision"]). But, despite adopting the questionable[1] *claim preclusion* and *issue preclusion* analysis of *Swartzendruber*, one can hardly criticize the actual holding in *Miller* that the *issue of insubordination* (a defense to the § 1983 action) was *actually litigated* in the prior state court proceeding.

Indeed, all three of the cases cited by the Acting Director (*Takahashi*, *Amin*, and *Miller*) all involve the circumstance of a disappointed litigant attempting to relitigate an issue that had already been *actually litigated*.

In conclusion, none of the cases cited by the Acting Director provide a compelling reason for the Supreme Court to exercise its discretion to review this case because

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[1] See *Miller* at 1034-1035 ["To determine whether the 'issue' of Swartzendruber's civil rights had been determined, the court examined the scope of the cause of action 'to determine if it encompasses the same primary right that was at stake in the Commission proceeding.' *Id.* at 71."]. Of course, in California, "primary rights analysis" is applicable to *claim preclusion* – not *issue preclusion*. However, the analytical error does not affect the ultimate outcome and the case that disapproved of *Swartzendruber* actually cited *Miller* with approval in a string of citations to illustrate the point that "[t]he *Westlake* requirement that a party exhaust judicial remedies has been applied in various state and federal decisions. . . . " (See *Johnson* (*supra*) at 70-71.)

here, in contrast to the cases cited by the Acting Director, the issue sought to be precluded was *never actually litigated* in a prior proceeding.

B. THERE IS NO COMPELLING REASON TO REVIEW THE FEDERAL RULE FOR ACCRUAL OF STATUTES OF LIMITATIONS BARRING CIVIL RIGHTS ACTIONS BROUGHT UNDER 42 U.S.C. § 1983

1. Review Of A Correctly Stated Rule Is Not Favored

The Acting Director's second ground for review is that the Ninth Circuit misapplied the federal rule for accrual of statute of limitations barring civil rights actions brought under 42 U.S.C. § 1983. The Ninth Circuit stated the accrual rule as follows:

> Federal law determines when a civil rights claim accrues. Under federal law, a claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action.

(See P.A. at 17.)

The Acting Director concedes that the rule is correct and that the "Ninth Circuit's decision announced that it follows this accrual rule as well." (P.B. at 19.)

Thus, the Acting Director's argument must be understood as contending that the Ninth Circuit misapplied the rule in the particular circumstances of the case.

So understood, the argument does not provide a "compelling" reason for the Court to review the case because "[a] petition for writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication

of a properly stated rule of law." (Rule 10, U.S. Supreme Court Rules of Court.)

2. Petitioner Failed To Raise A Tolling Issue

In any event, the "continuing enforcement" doctrine should logically be understood as an equitable tolling doctrine – not a modification of the federal rule of accrual. State law – not federal law – governs the application of tolling doctrines. (*Hardin v. Straub*, 490 U.S. 536, 543-544 (1989).)

By failing to raise the issue of tolling under state law and failing to cite any decision of the California Supreme Court that conflicts with the Ninth Circuit decision, the issue of tolling should be deemed procedurally forfeited. (Rule 14(a), U.S. Supreme Court Rules of Court; *Seaboard Airline Ry. Co. v. Watson*, 287 U.S. 86 (1932) [construing former Rule 9 and stating that the "purpose is to enable the court, as well as opposing counsel, to readily perceive what points are being relied on" and that the "substitution of vague and general statement for the prescribed particularity sets the rule at naught"].)

3. To The Extent The Ninth Circuit Has Adopted A Special Federal Rule Of Accrual For First Amendment *Prospective Relief* Claims, The Rule Is Justified

The Acting Director argues that "[t]he state court injunction functions as a prior restraint" and that therefore "Maldonado knew with the injunction's issuance that he had suffered injury to his asserted free speech rights." (P.B. 20.)

Although the Acting Director chides the Ninth Circuit for not citing any authority (see P.B. at 21 [ignoring citation to *RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1063 (CA9 2002)]), it is somewhat understandable that the question has not been raised in the past. Who else but Caltrans would have the gall to argue that a statute of limitations bars someone from obtaining relief from the *prospective* (i.e. future) enforcement of an unconstitutional statute? (*C.f. Degrassi v. City of Glendora*, 207 F.3d 636 (CA9 2000) [statute of limitations barred recovery of *money damages* for *past* First Amendment violations].)

The Acting Director is essentially arguing that Mr. Maldonado waited too long to object to the Acting Director doing something in the future.

With respect to "as applied" challenges, the Acting Director's rule would mean that at the injunction hearing every person being enjoined would be charged with knowing, raising, and litigating every possible thing he or she ever might want to say that is conceivably within the scope of the injunction – or forfeit the right to freely say those things forever (or for however long the injunction is enforced).

With respect to "general" challenges, the Acting Director's rule would even be more ridiculous. The rationale for statutes of limitation is set forth in *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-349 (1944). (See P.B. at 18.) However, in the case of someone challenging the constitutionality of a state statute, none of the articulated risks (i.e. lost evidence, faded memories, disappearing witnesses) are relevant; the constitutionality of a statute is a purely legal matter that does not depend upon evidence, memories, or witnesses.

Nor can the state claim that it might be deprived of the right to be free of such claims; so long as a statute is on the books, it is unreasonable for the state ever to expect repose from constitutional attacks because the fact that one citizen does not assert a challenge in a particular lawsuit does not mean other citizens cannot assert constitutional challenges based upon the same statutes in the future.

Indeed, logic, justice, and good public policy dictate that equitable considerations must afford relief from such a technical defense when a state might otherwise obtain an unconscionable advantage and enforce a forfeiture of an important federal right. What legitimate purpose could possibly be served by denying one plaintiff prospective equitable relief from enforcement of an unconstitutional statute when all other citizens subject to the statute would be free to challenge it?

To the extent the Ninth Circuit articulated a special rule of accrual for First Amendment claims brought under 42 U.S.C. 1983 that arise from injunctions and seek prospective relief, such a rule is justified. (See *Heck v. Humphrey*, 512 U.S. 477, 489 (1994) establishing special rule of accrual for § 1983 claims involving state prisoners ["That makes it unnecessary for us to address the statute-of-limitations issue wrestled with by the Court of Appeals, which concluded that a federal doctrine of equitable tolling would apply to the § 1983 cause of action while state challenges to the conviction or sentence were being exhausted."].)

C. THERE IS NO COMPELLING REASON TO REVIEW THE JURISDICTIONAL *ROOKER-FELDMAN* DOCTRINE

1. *Rooker-Feldman* In The Ninth Circuit

After reviewing *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983), and seven Ninth Circuit cases applying the *Rooker-Feldman* doctrine, the Ninth Circuit in *Noel v. Hall*, 341 F.3d 1148 (CA9 2003) at 1164 formulated the following rule:

> If a federal plaintiff asserts as a legal wrong an allegedly erroneous decision by a state court, and seeks relief from a state court judgment based on that decision, *Rooker-Feldman* bars subject matter jurisdiction in federal district court. If, on the other hand, a federal plaintiff asserts as a legal wrong an allegedly illegal act or omission by an adverse party, *Rooker-Feldman* does not bar jurisdiction. . . .

The *Noel* court also held that as a part of its refusal to hear "a forbidden de facto appeal from a judicial decision of a state court" a federal district court "must also refuse to decide any issue raised in the suit that is 'inextricably intertwined' with an issue resolved by the state court in its judicial decision." (*Noel* at 1158.) However, the *Noel* court noted that "[a]s a practical matter, the 'inextricably intertwined' test of *Feldman* is likely to apply primarily in cases in which the state court both promulgates and applies the rule at issue – that is, to the category of cases in which the local court has acted in both legislative and a judicial capacity – and in which the loser in state court later challenges in federal court both the rule and its application." (*Noel* at 1158.)

The *Noel* court noted that "[t]his formulation of the *Rooker-Feldman* doctrine is consistent with the two cases themselves; with all our cases holding that *Rooker-Feldman* bars jurisdiction; with the two long-established rules permitting simultaneous state and federal litigation, and requiring federal courts to apply the preclusion rules of the states under § 1738; and with many (though not all) of the formulations of the *Rooker-Feldman* doctrine in other circuits" including the "similar formulation" articulated by the Seventh Circuit. (*Noel* at 1164 citing *GASH Associates v. Village of Rosemont*, 995 F.2d 726 (CA7 1993) and other Seventh Circuit cases relying thereon.

In general, the *Noel* court identified two scenarios in which *Rooker-Feldman* would likely defeat jurisdiction:

> First, the federal plaintiff may complain of harm caused by a state court judgment that directly withholds a benefit from (or imposes a detriment on) the federal plaintiff, based on an allegedly erroneous ruling by that court. This was the case in *Feldman*, where the local court had refused to grant to the federal plaintiffs a waiver of the local bar admission rule. . . .
>
> Second, the federal plaintiff may complain of a legal injury caused by a state court judgment, based on an allegedly erroneous legal ruling, in a case in which the federal plaintiff was one of the litigants. This was the case in *Rooker*, where the state court had already decided a case between two sets of private litigants. The disappointed state court litigants then brought suit in federal court asserting as their legal injury the state court judgment based on an alleged legal error committed by that court. . . .

(*Noel* at 1163.)

The *Noel* opinion was written by the Honorable Judge William Fletcher and was joined by the Honorable Judges Thomas Reavley (Senior Judge of the Fifth Circuit, sitting by designation), and Alex Kozinski. The *Rooker-Feldman* formulation set forth in *Noel* will hereinafter be referred to as the *Noel* formulation.

2. How *Rooker-Feldman* Was Applied Below

In this case, the Ninth Circuit utilized the *Noel* formulation and determined that "the legal wrong that Maldonado asserts in this action is not an erroneous decision by the state court in the nuisance suit brought against Maldonado by Caltrans, but the continued enforcement by [the Acting Director] of a statute Maldonado asserts is unconstitutional." (See P.A. at p. 6.) Indeed, at no time has Mr. Maldonado asserted as a legal wrong an allegedly erroneous decision by a state court; Mr. Maldonado has never asserted that the state court erroneously decided any of the issues that were actually litigated in the state court. (See Argument A, Sec. 3 (*supra*) as to what issues were actually litigated in the state court.)

The Ninth Circuit noted that Mr. Maldonado's prayer seeks "relief from the injunction entered by the state court." (See P.A. at p. 7.) However the Ninth Circuit pointed out that under the *Noel* formulation, "a plaintiff must seek not only to set aside the judgment; he or she must also allege a legal error by the state court as the basis for that relief." (See P.A. at p. 8 quoting *Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1140 (CA9 2004).)

Thus, although a federal court was being asked to provide direct relief against a state court judgment, under the *Noel* formulation the Ninth Circuit concluded that Mr.

Maldonado was not bringing a de facto direct appeal and therefore the *Rooker-Feldman* doctrine did not bar subject-matter jurisdiction in the U.S. District Court.

Moreover, since there was no bar to subject-matter jurisdiction, the Ninth Circuit had no occasion to consider whether the *scope* of the jurisdictional bar included just the issues that were actually litigated in the state court action, or extended to other issues that were "inextricably intertwined" with the judgment of the state court. (See P.A. at p. 7 quoting *Noel* at 1158 ["Only when there is already a de facto appeal in federal court does the 'inextricably intertwined' test come into play."].)

3. Petitioner's Contentions

With respect to the *Rooker-Feldman* doctrine, the Acting Director contends that the Ninth Circuit decisions in this case and *Noel v. Hall*, 341 F.3d 1148 (CA9 2003) "reject" and "disregard" the "inextricably intertwined" test utilized in other circuits. (See Petitioner's Brief (P.B.) at p. 8 and fn. 1.) Specifically, the Acting Director contends that the Ninth Circuit fails to "properly focus [its] *Rooker/Feldman* analysis on whether *the effect of the relief requested or the findings of the federal court* would act to reverse, nullify, or modify the state court judgment." (P.B. at p. 10.)

Thus, the Acting Director's arguments are twofold: The general claim is that the Ninth Circuit refused to apply the "inextricably intertwined" test at all, and the specific claim is that the Ninth Circuit failed to use a particularly broad version of the test.

4. Petitioner's Proposed "Effect Of The Relief" Test Is Inconsistent With *Johnson v. Degrandy* And 28 U.S.C. § 1738

With respect to the Acting Director's specific claim that the Ninth Circuit should have applied a broad "effect of the relief" test, it must be pointed out that such a test would be inconsistent with *Johnson v. DeGrandy*, 512 U.S. 997 (1994) and 28 U.S.C. § 1738. (See also *Noel* at 1161 ["We have never in this circuit applied the *Rooker-Feldman* doctrine so broadly as to conflict with either the rule permitting parallel state and federal litigation or the rule of § 1738 requiring federal courts to follow state preclusion rules."].)

In *DeGrandy*, the Florida Supreme Court approved a political redistricting plan and admittedly failed to conduct the "complete factual analysis contemplated by the Voting Rights Act." (*Id.* at 1005.) Thereafter, instead of appealing to the U.S. Supreme Court, the United States and other plaintiffs filed an action in federal court challenging the redistricting plan.

Rooker-Feldman did not defeat jurisdiction for two reasons: First, the United States was not a party to the prior action and thus had not *actually litigated* the federal question in state court. (*Id.* at 1006 ["The United States merely seeks to litigate its § 2 case for the first time. . . ."].) Second, the federal question was not "inextricably intertwined" with the prior state court action because the State Supreme Court had expressly authorized new petitions to be filed. (*Id.* at 1005 [The Florida Supreme Court approved the redistricting plan "without prejudice to the right of any protestor to question the validity of the plan by filing a petition . . . alleging how the plan violates the Voting Rights Act."].)

One of the lessons of *DeGrandy* is that a federal court owes no deference to a state court judgment that the state itself does not regard as a final adjudication. (See *Fontana Empire Center, LLC v. City of Fontana*, 307 F.3d 987 (CA9 2002) citing *Davis v. Bayless*, 70 F.3d 367, 376 (CA5 1995) and *Gauthier v. Cont'l Driving Servs., Inc.*, 831 F.2d 559, 561 (CA5 1987).)

As aptly noted in *Noel*, "The Court's caution in cases after *Rooker* and *Feldman* is understandable in light of two well-established rules that would be in tension with an overly broad reading of the *Rooker-Feldman* doctrine. They are, first, the rule that overlapping or even identical federal and state court litigation may proceed simultaneously, limited only by doctrines of abstention and comity; and, second, the rule of 28 U.S.C. § 1738, under which a federal court must give the same preclusive effect to a state court judgment as the state courts of that state would themselves give to that judgment." (See *Noel* at 1159.)

Here, California law permits collateral challenges to permanent injunctions. Although a *federal injunction* that is not "transparently invalid" or "frivolous" may generally only be attacked as unconstitutional in federal court by direct appellate review, the well-established rule in California is that the unconstitutionality of a *California injunction* can be attacked collaterally regardless of (1) whether the invalidity appears "on the face of the order" and (2) regardless of whether the enjoined party "failed to seek modification or vacation of it." (*In re Berry*, 68 Cal.2d 137 [65 Cal.Rptr. 273, 279-282] (1968) distinguishing *United States v. United Mine Workers*, 330 U.S. 258 (1967) [general federal rule re federal injunctions] and *Walker v. City of Birmingham*, 388 U.S. 307 (1967) [5-4 decision

upholding Alabama rule denying right to collaterally attack injunction that was not void on its face].) Thus, even if an "inextricably intertwined" test were to be applied, *Rooker-Feldman* could not defeat jurisdiction.

Indeed, such a broad statement of the *Rooker-Feldman* doctrine would constitute an unprecedented limitation of federal judicial power. Article III, § 2 of the United States Constitution states that "[t]he judicial power shall extend to all cases, in law and equity, arising under this Constitution. . . . " The power of a District Court to stay state court proceedings is governed by 28 U.S.C. § 2283 which expressly authorizes an injunction against a state court, "where necessary in aid to its jurisdiction, or to protect or effectuate its judgments." Further, the U.S. Supreme Court has held that an injunction issued under 42 U.S.C. § 1983 is an "expressly authorized" exception to limitations contained within 28 U.S.C. § 2283. (*Mitchum v. Foster*, 407 U.S. 225 (1972); see also *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623 (1977); *Imperial v. Munoz*, 449 U.S. 54 (1980); see also Fourteenth Amendment, § 5.)

5. The Ninth Circuit's Decision Not To Apply The "Inextricably Intertwined" Test Is Academic Because The First Step Of The Test In Other Circuits Is Identical To The Test That Was Applied

With respect to the Acting Director's general claim that the Ninth Circuit refused to apply the "inextricably intertwined" test at all, it must be pointed out that the only difference between the tests utilized by the Ninth Circuit and the other circuits is one of semantic, and perhaps academic, significance. The difference is that the

Ninth Circuit views its *Noel* formulation as being a first step *before* the "inextricably intertwined" test, whereas the other circuits implicitly or explicitly make their gatekeeping test the "first step" *of* the "inextricably intertwined" test.

Thus, unlike the Ninth Circuit, most circuits tend to jump immediately into their own version of the "inextricably intertwined" test without first independently determining whether they are dealing with a forbidden de facto direct appeal of a state court judgment. However, as a first step in the analysis, these other circuits incorporate their own versions of the *Noel* formulation into the "inextricably intertwined" tests that they employ.

Practically speaking there is no significant difference between the *Noel* formulation and the "inextricably intertwined" test utilized by the other circuits discussed by Petitioner because at some point in each and every case the federal court determined whether the federal plaintiff was alleging a legal error by a state court and requesting relief from the state court judgment based on that legal error.

Analyzing minor semantic differences might make for an interesting law review article by a pedantic law student in academia, but it surely does not present a compelling case for U.S. Supreme Court review. Indeed, the Acting Director fails to present a compelling case for review because he fails to demonstrate that the result in this case would be different if a *Rooker-Feldman* formulation from another circuit were utilized. A review of the cases discussed by the Acting Director is instructive on these points:

a. The Third Circuit

The Acting Director discusses two Third Circuit cases in support of his position: *FOCUS v. Allegheny County Court of Common Pleas*, 75 F.3d 834 (CA3 1996) and *E.B. v. Verniero*, 119 F.3d 1077 (CA3 1997).

In *FOCUS*, an advocacy group wanted to intervene in a high-profile child custody case for the limited purpose of challenging the trial judge's gag order. "In a quick series of events, (1) the court of common pleas rebuffed FOCUS' attempt to intervene, (2) the Pennsylvania Superior Court refused to entertain FOCUS' motion for a writ of mandamus, and (3) the Pennsylvania Supreme Court denied FOCUS' petition to exercise its King's Bench jurisdiction to declare the gag orders unconstitutional. FOCUS then joined forces with the two individual plaintiffs and filed this § 1983 suit in federal district court, alleging that the state court and its judge violated their First Amendment rights." (*Id.* at 836-837.)

The Third Circuit stated the applicable rule as follows, "*Rooker-Feldman* applies only when in order to grant the federal plaintiff the relief sought, the federal court must determine that the state court judgment was erroneously entered or must take action that would render that judgment ineffectual." (*Id.* at 840 citing *Marks v. Stinson*, 19 F.3d 873, 886 n. 11 (3d Cir.1994) [holding *Rooker-Feldman* inapplicable where "the district court could (and did) find that [the plaintiffs'] constitutional claims had merit without also finding that the [state] court erred"].)

Although a declaration by the federal court in *FOCUS* that the state court gag order was unconstitutional would have "rendered that judgment ineffectual", the *FOCUS* court found *Rooker-Feldman not* applicable because (1) the

trial court judge "did not decide FOCUS' constitutional challenge to the gag orders or any other issue that is a predicate to the claim in the federal proceeding" (*id.* at 841), and (2) the Supreme Court merely chose not to exercise its extraordinary jurisdiction and "[n]ot only is the district court being asked to adjudicate an issue distinct from any the Supreme Court of Pennsylvania expressly adjudicated, it is also being asked to grant relief that is entirely consistent. . . . " (*Id.* at 842.) In short, a party in the state court was not asking the federal court to determine whether the state court was wrong.

Thus, call it what you may, the formulation used by the Third Circuit is essentially the same as the *Noel* formulation.

The other Third Circuit case discussed by the Acting Director also does not help him. *E.B. v. Verniero* (*supra*) concerned a challenge to "Megan's Law" – the sex-offender notification law. The sex offender challenged his "notification plan" and "advanced federal constitutional arguments" in the trial court. The challenges were rejected and thereafter he appealed to the Appellate Division, which affirmed. The Supreme Court of New Jersey thereafter denied the sex offender's petition for certification of appeal. Then, instead of appealing to the United States Supreme Court, the sex offender filed a case in U.S. District Court raising the same constitutional arguments and seeking "an injunction directing that the notification ordered by the New Jersey Superior Court, Law Division, not be carried out." (*Id.* at 1090.)

The Third Circuit recognized the case as a "paradigm" *Rooker-Feldman* situation because "[t]o grant [the sex offender] relief would require an inferior federal court to

determine that the New Jersey court's judgment was erroneous and would foreclose implementation of that judgment." (*Id.* at 1091 citing *FOCUS* (*supra*).) In addition, the Third Circuit refused to countenance the arguments that the state courts did not genuinely consider the sex offender's arguments and that the existence of adverse case law in the state provided a legitimate reason for the sex offender to abandon the normal avenue of appeal. (*Id.* at 1091.)

Thus, the Third Circuit determined that the sex offender was claiming a legal error by the state court, and seeking relief from the judgment based on that error – a paradigm example of the *Noel* formulation.

b. The Seventh Circuit

The Seventh Circuit case discussed by the Acting Director is *GASH Associates v. Village of Rosemont, Ill.*, 995 F.2d 726 (CA7 1993). In *GASH*, a village instituted a condemnation proceeding while a foreclosure was pending and then bought the subject property at the foreclosure sale. One of lenders that had its security interest wiped out by the foreclosure sale objected to the state trial court's confirmation of the foreclosure and appealed to the state court of appeals, arguing that the village had essentially "taken" the property in violation of the Fifth Amendment to the U.S. Constitution because instituting the condemnation proceeding devalued the property and scared off prospective bidders. After losing the appeal, the disappointed lender filed a claim in federal court advancing the same claims it had made in the state court of appeal.

The Seventh Circuit stated the rule as follows, "[I]s the federal plaintiff seeking to set aside a state judgment,

or does he present some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party? If the former, then the district court lacks jurisdiction; if the latter, then there is jurisdiction and state law determines whether the defendant prevails under principles of preclusion." (*GASH* at 728 [citation omitted].)

Applying this rule, the Seventh Circuit noted that the lender's injury "came from the judgment confirming the sale, rather than requiring the Village to condemn the building independently of the foreclosure, as [the lender] had demanded. Both trial and appellate courts in Illinois considered and rejected this position on the merits. The appellate court expressly rebuffed [the lender's] contention that the pending condemnation action unduly depressed the price realized in the auction. Only the Supreme Court of the United States was authorized to review that decision." (*GASH* at 729.)

Thus, the Seventh Circuit found that the federal plaintiff in *GASH* was asserting as a legal wrong an allegedly erroneous decision by the state court, and was seeking relief from the state court judgment based on that decision. This is the precise test set forth in the *Noel* formulation. (See *Noel* at 1164 ["Of the formulations in the other circuits, we find most notable (and most useful) the similar formulation of the Seventh Circuit, first articulated at some length by Judge Easterbrook in *GASH*. . . ."].)

c. The Tenth Circuit

The Acting Director noted that *GASH* was "cited with approval" by the Tenth Circuit in *Kenman Engineering v. City of Union*, 314 F.3d 468 (CA10 2002).

In *Kenman Engineering* a city sought and obtained a permanent injunction against a business in state court mandating that it store its magnesium in compliance with all applicable local, state, and federal laws. Apparently unable to comply with the local ordinance, the business sold the magnesium at a loss. Thereafter, the business filed a federal action for damages alleging that the city's action in the particular case amounted to an unconstitutional taking of property without due process of law and that the city ordinance should have been preempted.

The Tenth Circuit upheld dismissal upon *Rooker-Feldman* grounds stating, "[W]e approach the question by asking whether the state-court judgment caused, actually and proximately, the injury for which the federal-court plaintiff seeks redress. If it did, *Rooker-Feldman* deprives the federal court of jurisdiction." With respect to the due process claim, the Tenth Circuit noted that "plaintiffs seek monetary damages attributable to losses they sustained as a result of being forced – by state-court order – to remove magnesium from their Union City storage facility. Plaintiffs do not request any form of prospective declaratory or injunctive relief." With respect to the preemption claim, the Tenth Circuit noted that "the injury for which plaintiffs seek redress is not the possibility of Union City applying its municipal fire code against them in the future. Rather, plaintiffs seek damages for Union City's past application of its municipal fire code – an application sanctioned in a prior state-court judgment."

Thus, in its own way, the Tenth Circuit determined whether the plaintiff was asserting as a legal wrong the erroneous decision of a state court and seeking relief from the judgment based upon those errors. Unquestionably, the answer to both questions was yes and thus, consistent with the *Noel* formulation, federal jurisdiction was defeated.

d. The Eighth Circuit

The Eighth Circuit case discussed by the Acting Director is *Charchenko v. City of Stillwater*, 47 F.3d 981 (CA8 1995).

In *Charchenko* a former police officer filed a lawsuit in state court alleging wrongful termination and denial of due process. The state court action was dismissed for lack of subject-matter jurisdiction and the former police officer then re-filed the same case in federal court where it was dismissed under the *Rooker-Feldman* doctrine.

In reviewing the federal dismissal, the Eighth Circuit stated that "to determine whether *Rooker-Feldman* bars Charchenko's federal suit requires determining exactly what the state court held and whether the relief requested by Charchenko in his federal action requires determining the state court's decision is wrong or would void its ruling. If the relief requested in the federal action requires determining that the state court decision is wrong or would void the state court's ruling, then the issues are inextricably intertwined and the district court has no subject matter jurisdiction to hear the suit." (*Charchenko* at 983.)

The Eighth Circuit examined the state court proceedings and determined that the state courts had ruled that

"state trial courts do not have subject matter jurisdiction to review a municipality's decision to terminate a city employee." (*Charchenko* at 983.)

With respect to the constitutional claims, the Eighth Circuit ruled that even assuming the state court lacked subject-matter jurisdiction to consider the constitutional claims (a dubious proposition, see *Charchenko* at fn. 2), federal jurisdiction was not defeated because the state court decision did not purport to define federal jurisdiction and "[t]he deprivation of state court subject matter jurisdiction in Sec. 1983 suits does not affect the federal district court's original jurisdiction." (*Charchenko* at 983-984.)

The Eighth Circuit also stated that "[t]he choice of whether to proceed in a state or federal forum . . . necessarily belongs to the plaintiffs and they cannot be deprived of it by a state rule which gives preclusive effect to unappealed state administrative decisions." (*Charchenko* at 984 [citations and internal quotations omitted].)

Thus, as to the federal claim, the Eighth Circuit's approach was similar to the *Noel* formulation because it determined that the federal plaintiff was not alleging an erroneous decision by the state court and seeking relief based thereon.

With respect to the state law wrongful termination claims, the Eighth Circuit noted that the federal plaintiff "did not pursue any administrative remedies in state court [and] [t]his failure caused the state trial court to determine that it had no subject matter jurisdiction to hear the merits of . . . Charchenko's state wrongful termination claims. . . ." (*Charchenko* at 984.)

Since the federal plaintiff did not advance any independent basis for alleging wrongful termination, the Eighth Circuit construed the federal complaint as alleging that the state court had committed an error as to its determination of subject-matter jurisdiction and that the federal plaintiff was requesting damages based upon that error. (See *Charchenko* at 984, "allowing the district court to apply state law to the merits of Charchenko's wrongful termination claim would effectively void" the determination that the federal plaintiff had failed to exhaust administrative remedies.)

In any event, *Charchenko* is not on point in this case because Mr. Maldonado is not attempting to present in federal court any state law claim that was dismissed in state court for lack of subject-matter jurisdiction.

III. CONCLUSION

For the reasons stated above, there are no compelling reasons for the United States Supreme Court to grant certiorari in this case. The Acting Director fails to carry his burden of demonstrating a clear conflict between the Ninth Circuit's decision in this case and a decision of the California Supreme Court. Moreover, any difference between the Ninth Circuit and other circuits are academic or semantic rather than substantive. In addition, the Acting Director fails to demonstrate that the result would be different if the formulations of other circuits were utilized. Finally, the formulation suggested by the Acting Director appears to conflict with Congressional statutes and precedent of the United States Supreme Court.

Mr. Maldonado should, for the first time, be permitted to present his First Amendment claims for *prospective*

relief against the Acting Director of the California Department of Transportation in the forum of his choosing. Mr. Maldonado suffers irreparable harm the longer he is denied his day in court. A right deferred is a right denied.

Respectfully submitted,

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